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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T COMMUNICATIONS Revisions to Tariff F.C.C. No. 1

Transmittal Nos. 1762 and 1880

ORDER

Adopted: November 28, 1989; Released: November 28, 1989

By the Chief, Common Carrier Bureau:

1. On August 31, 1989, American Telephone and Telegraph Company (AT&T) filed Transmittal 1762, proposing changes in the rate levels and rate structure for its Software Defined Network (SDN) service. Specifically, Transmittal 1762 would: (1) modify the SDN Expanded Volume Plan (EVP) and Usage Reduction Plan (URP); (2) modify the rate structure of the SDN Local Access Transport Area (LATA) Pair Pricing Plan; (3) introduce a Location Account Billing Option (LABO) for SDN;[1] (4) provide a credit for local exchange carrier (LEC) primary interexchange carrier (PIC) selection charges and eliminate access line grouping charges for certain SDN switched access locations; (5) change the SDN time-of-day structure to conform to the structure for AT&T's Megacom service; (6) provide a discount for certain operator assisted and international calls billed to an SDN account; and (7) revise the credit allowance regulations for Custom Network Services. AT&T Description and Justification (D&J) at 2.

2. US Sprint Communications Company Limited Partnership (Sprint) filed a petition to reject or, in the alternative, to suspend and investigate on September 15, 1989. Sprint asserts that AT&T has failed to provide sufficient information with which to determine whether the proposed revisions are compensatory and in the public interest. AT&T filed a reply on September 25, 1989. Subsequently, AT&T filed Transmittal 1880 on November 3, 1989, in order to address some of the concerns raised by Sprint regarding AT&T's LABO service. Whereas Transmittal 1762 requires that LABO end users engage in a common business using a common brand or trade name, Transmittal 1880 eliminates the common brand or trade name requirement. Sprint petitioned against Transmittal 1880 on November 13, 1989, again urging the Commission to reject, or in the alternative, to suspend and investigate that AT&T filing. AT&T subsequently filed a reply on November 22, 1989. Moreover, AT&T filed Application No. 641 on November 28, 1989, requesting that the Common Carrier Bureau allow AT&T to defer Transmittal 1880 and that portion of Transmittal 1762 regarding the LABO. That application was granted by the Tariff Division on November 28, 1989. The remainder of Transmittal 1762 is due to become effective on November 29, 1989.

3. In its petition, Sprint asserts that AT&T has improperly replaced the average variable cost (AVC) test required by Section 61.69(d) of the Commission's Rules, 47 C.F.R. § 61.49(d), with a "revenue less cost" test in order to support below-band rate changes for SDN service.[2] Sprint Petition at 2. Moreover, Sprint argues that even if the "revenue less cost" test were an acceptable substitute for the required AVC test under Section 61.49(d), AT&T has still failed to comply with that section because its financial analysis is deficient. *Id.* at 3. Sprint also contends that AT&T's cost forecasts are deficient and that the terms and conditions of AT&T's proposed LABO service are vague in violation of Section 61.54(j) of the Commission's Rules, 47 C.F.R. § 61.54(j). *Id.* at 6-9.

4. AT&T notes in its reply to the petition against Transmittal 1762 that the concerns raised by Sprint with regard to below band showings have been rejected by the Commission in previous proceedings. *Id.* at 2. In addition, AT&T asserts that the below band showing that it provides with Transmittal 1762 contains the same level of detail as previous filings that have been accepted by the Commission. *Id.* at 5. AT&T also disputes Sprint's claim that AT&T's forecast regarding the anticipated revenues for 1990 are excessive. *Id.* at 7-8. Finally, AT&T denies that the terms and conditions for its proposed LABO service are vague. *Id.* at 9.

5. The Common Carrier Bureau has reviewed the tariff revisions and the pleadings. Since AT&T has deferred Transmittal 1880 and a portion of Transmittal 1762, we do not address in this Order the Sprint petition against Transmittal 1880. Neither do we address arguments raised in the Sprint petition against Transmittal 1762 that relate to the deferred portions of that filing. With regard to the Sprint petition as it relates to the provisions of Transmittal 1762 scheduled to take effect on November 29, we conclude that those provisions are not so patently unlawful as to warrant rejection, and that an investigation is not necessary at this time.

6. IT IS THEREFORE ORDERED that the petition to reject or, in the alternative, to suspend and investigate filed by US Sprint Communications Company Limited Partnership against AT&T Communications, Tariff F.C.C. No. 1, Transmittal No. 1762, IS DENIED to the extent described herein.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] LABO is a billing arrangement which allows one customer to order SDN service for end users located in different locations, provided that the ordering customer owns the end user company, operates it under a franchise, or provides the end user with centralized management, oversight, or coordination. In addition, with the customer ordering SDN, the end user was required to operate in a common business under AT&T's initial filing, using a common brand or trade name. AT&T Reply at 8-9. AT&T deleted the common brand or trade name requirement in the subsequent filing of Transmittal 1880. *See* para. 2,

infra. While the AT&T customer orders the SDN service, the end users must pay for that portion of the service they use. Hence, under the pending tariff, the ordering customer is not held responsible for the financial obligation imposed on the end users for the use of AT&T's SDN service.

[2] Part of AT&T's rate changes for SDN include rate decreases that would take the SDN service category in Basket 3 business services below the price floor established by the price cap rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 89-533

In the Matter of

Cincinnati Bell Telephone Company Revisions to Tariff F.C.C. No. 35	Transmittal No. 535
Southern New England Telephone Company Revisions to Tariff F.C.C. No. 39	Transmittal No. 480

ORDER

Adopted: November 14, 1989; Released: November 15, 1989

By the Deputy Chief, Common Carrier Bureau:

I. BACKGROUND

1. On August 18, 1989, Cincinnati Bell Telephone (CBT) filed Transmittal No. 535 which would, *inter alia*, establish a general tariff offering for special access DS3 high capacity (HiCap) services. On September 5, 1989, MCI Telecommunications Corporation (MCI) filed a petition to suspend and investigate Transmittal 535 (MCI Petition-CBT), to which CBT replied on September 15, 1989 (CBT Reply). Southern New England Telephone (SNET), on August 30, 1989, filed Transmittal No. 480, which would also offer DS3 HiCap service under a general tariff offering. On September 14, 1989, American Telephone and Telegraph Company (AT&T), MCI, and US Sprint Communications Company Limited Partnership (Sprint) filed separate petitions to suspend and investigate Transmittal 480 (AT&T Petition, MCI Petition-SNET, and Sprint Petition, respectively). On September 25, 1989, SNET replied to the petitions against Transmittal 480. CBT Transmittal 535 and SNET Transmittal 480 are scheduled to become effective on November 16, 1989.

II. SUMMARY OF PLEADINGS

A. *Cincinnati Bell Transmittal No. 535*

2. MCI claims CBT's DS3 rates reflect strategic pricing. MCI argues that strategic pricing of DS3 service should be subject to the standards set for DS1 service in the Commission's *Strategic Pricing Order*,[1] which MCI describes as requiring rates for high capacity service with crossover points between DS1 and voice grade service of greater than 8 to 1 to be supported by substantial justification. MCI maintains that CBT's DS3 rates are based on a 16 to 1 ratio to DS1 rates, and therefore fall outside the crossover ratio zone of reasonableness and require substantial justification. MCI Petition-CBT at 2. MCI alleges that CBT has not submitted any information regarding its actual cost of providing DS3 high capacity service, and instead relies entirely on strategic pricing. Thus, MCI argues, it is impossible to determine whether these CBT rates are just and reasonable as required by Section 202(b) of the Communications Act (Act), 47 U.S.C. § 202(b). *Id.* at 3. Therefore, MCI requests that CBT's proposed DS3 rates be suspended and an investigation be initiated to determine the appropriate DS3 to DS1 crossover point. *Id.*

3. In addition, MCI argues that CBT's grandfathering of ICB arrangements is contrary to Section 202 of the Act since it will result in unreasonable discrimination in rates charged to similarly situated customers. *Id.* at 4. MCI asserts that CBT's ICB rates will be cost based while strategic pricing will be applied to the general tariffed offering for DS3 service, thereby creating two separate classes of customers for which CBT offers no justification. *Id.* MCI claims that CBT's arguments for grandfathering – that ICB contracts require higher initial fees, and that dissolution of existing contracts would cause rate shock – are identical to arguments made by other local exchange carriers (LECs) in the Commission's on-going ICB investigation in CC Docket No. 88-136.[2] Therefore, MCI requests that CBT's transmittal be included in that investigation.

4. MCI also asserts that CBT's transmittal offers volume discounts for DS3 channel termination that are contrary to the Commission's volume discount rules, [3] which provide, *inter alia*, that a carrier offering a bulk discount for a service bears the burden of demonstrating that material cost savings accrue as a result of provision of the service on a volume basis. *Id.* at 5. MCI states that CBT provides no cost support for its proposed volume discount and has not requested a waiver of the volume discount rules. Thus, MCI contends, CBT's volume discount offering for DS3 channel termination conflicts with Commission rules and should be suspended and investigated. *Id.*

5. CBT opposes MCI's petition, stating that the Commission did not address the crossover between DS3 and DS1 in its *Strategic Pricing Order*, and suggests that MCI's analogy to the 8 to 1 crossover between DS1 and voice-grade does not show that CBT's DS3 rates are unreasonable. CBT Reply at 3. CBT further argues that it has had difficulty in developing averaged rates because it has only recently begun to offer DS3 service on a limited basis and consequently lacks the historical data upon which to develop such rates. *Id.* at 4. Absent information on which to base a strictly cost-based averaged DS3 rate, CBT maintains it is reasonable to apply a crossover method similar to the one CBT used to establish DS1 rates in its 1989 annual access tariff filing.[4]

6. CBT claims that it is not attempting to justify the creation of two classes of customers: rather, CBT views grandfathering as an equitable adjustment in its transition from providing DS3 service on an ICB basis to a general tariff rate. *Id.* at 7. CBT represents that it has no intention of perpetuating ICB pricing beyond the term of the existing contracts, and claims that ICB DS3 customers should be afforded the right to choose between continuing service at the ICB rate for the duration of the agreement or

opting for CBT's general tariff rate. *Id.* Moreover, CBT asserts that denial of grandfathering would discriminate against ICB customers and penalize them for being among the first to negotiate DS3 access. *Id.*

7. Further, CBT contends that MCI is wrong in suggesting that CBT must justify its proposed volume discount on a Fully Distributed Cost (FDC) basis, or seek a waiver based on competitive necessity. *Id.* CBT asserts that the very standards that MCI cites were rejected by the Commission in its *Volume Discount Practices Order*.[5] CBT maintains that that Order provides that each volume discount should be considered on an individual basis, but does not adopt an FDC or any specific standard for determining the reasonableness of the volume discount. *Id.* at 8. Rather, CBT claims that the Commission emphasized that the Commission's primary concern in assessing a volume discount would be whether the discount fit into an integrated structure of similar service offerings, contributed to meeting competition, reasonable rates, and efficient services for all users. *Id.* CBT argues its DS3 general rates, including the volume discount, are part of an integrated structure for its Special Access service offerings that feature a volume discount for multiple lines and extended terms of service designed to help CBT meet competition for providing DS3 service. *Id.* at 9. Thus, CBT submits, its proposed rates and the volume discount are reasonable and increase efficiencies for CBT's customers by supplying higher speed service at significant rate reductions.

B. ***SNET Transmittal No. 480***

8. AT&T states that it opposes SNET's generic DS3 filing because the tariff seeks to impose unreasonable charges for early termination of a long term optional payment plan, and imposes unreasonable charges for upgrading existing 1.5 Mbps (DS1) service to the tariffed DS3 facilities. AT&T Petition at 1.

9. The imposition of a termination liability charge equal to the present value of the total monthly charges applied to each month or fraction thereof for the balance of the selected commitment period would, AT&T asserts, allow SNET to receive the discounted present value of the entire future payments even though it is questionable whether SNET would incur the full costs if a customer prematurely terminates service. *Id.* at 2.[6]

10. AT&T further asserts that DS1 customers who wish to upgrade to DS3 service are required to pay certain nonrecurring charges under SNET's transmittal. The nonrecurring charge to which AT&T objects is for testing each voice grade circuit carried on a DS1 channel being upgraded to DS3. *Id.* at 4. AT&T contends that the proposed mandatory circuit testing with the DS1 to DS3 upgrade is contrary to the Commission's policy that customers' selections among services not be unreasonably restricted by a carrier's tariffs.[7] SNET's tariffs for DS3 service must be unbundled, AT&T argues, so that access customers do not have to order an unneeded service, such as voice grade circuit testing, in order to establish DS3 service. *Id.*

11. In its reply, SNET argues that the termination liability provisions are reasonable, based upon the limited demand for its DS3 service. SNET Reply at 7. SNET maintains that termination liability is a widely used mechanism that assures a company of anticipated revenue in return for discounting the customer's monthly rate, as well as assuring that any revenue shortfall would not be subsidized by other ratepayers. *Id.* SNET asserts that its experience shows there is limited demand for DS3 service, and that there are no assurances that facilities made available due to terminations would be reused, as AT&T contends. *Id.* at 8. In addition, SNET argues that its charges to upgrade DS1 service to DS3 service are justifiable; it proposes, however, eliminating the testing function and charges and modifying the nonrecurring charge for voice grade circuits which roll over to DS1. *Id.* at 9. SNET states that this modification will reduce the per voice grade circuit roll over charge from $188.08 to $147.19. Moreover, SNET asserts that customers who have voice grade circuits tested at the time of DS3 conversion will be charged the existing rearrangement charge in lieu of the nonrecurring charge for voice grade to DS1 roll over. *Id.*

12. MCI asserts that SNET has priced its month-to-month and three-year payment plans above what the Commission has found to be reasonable in the application of strategic pricing. MCI Petition-SNET at 1. MCI contends that SNET has only shown that its five-year payment plan falls within the acceptable 8 to 1 ratio between DS3 and DS1 rates, arguing that SNET's month- to-month and three-year payment plans are not cost justified and are priced above the reasonable 8 to 1 crossover ratio. *Id.* at 2-3. MCI alleges that SNET's authorized rate of return is already included in its five-year rates, and that SNET would earn unlawfully high profits on any month-to-month or three-year DS3 plans. *Id.* In addition, MCI argues that grandfathering of existing ICB arrangements will result in discrimination in violation of Section 202 of the Act. *Id.* at 3-4.

13. SNET replies that its DS3 rates establish a reasonable DS1 to DS3 crossover range of between 6.8 (5 year plan) and 11.6 (month-to-month plan) based on equivalent DS1 rates. SNET Reply at 5. SNET asserts that the crossover range for its DS3 service is well within the industry average for "approved" DS3 tariffs, and alleges that its proposed month-to-month crossover point recognizes the need to recover the significant network investment over a much shorter time period. *Id.* SNET also contends that MCI fails to account for the differences in capacity between voice grade and DS1 service versus DS1 and DS3 service, and states that MCI ignores the per unit efficiency gained by migrating to DS3 service. *Id.* at 6. Therefore, SNET argues, its proposed DS3 rates conform to the Commission's strategic pricing guidelines and establish a reasonable crossover range which encourages efficient use of the network. SNET asserts that grandfathering is reasonable because its ICB contracts should be honored by the customer and SNET until the expiration of the term, since the rates were based on the cost of providing the service to each individual customer, and the termination of the ICB contracts would interfere with full cost recovery. *Id.* at 12.

14. Sprint contends that SNET's DS3 tariffed rates appear to be excessive since a comparison shows that they range from 65 to 75 percent higher than SNET's DS3 ICB prices. Sprint Petition at 2. Sprint argues that SNET's unit resource cost analysis is misleading because it is based on the individual installation of DS3 facilities which ignores that such facilities are installed on a system-wide basis. Sprint alleges that the cost of activating additional DS3 circuits is far less than that of activating the first circuit because the fiber optic equipment has already been installed. Thus, Sprint argues, charging virtually the same

rate for additional DS3 circuits and the initial DS3 circuit may result in significant overrecovery of the cost of these facilities. *Id.* at 3.

15. Moreover, Sprint objects to the rate structure of the channel mileage element, which consists of both a fixed and a per mile charge. *Id.* Sprint contends that there is no reason why the fixed monthly charge should be exactly the same for all three commitment length categories of service, arguing that channel mileage charges should decrease as the contract term increases. According to Sprint, this is current industry practice. Sprint further contends that SNET has not provided any justification for the per-mile charges for the one and three year commitment terms. *Id.*

16. Sprint further challenges the capital unit costs SNET submits to support its proposed rates, characterizing them as excessive. *Id.* at 3-4. Sprint asserts that this category of costs, which consists of depreciation, earnings requirements, and income and property taxes, appears to be greatly inflated to achieve a particular charge for the rate element or a particular strategic pricing objective. Sprint claims that SNET offers no explanation of why the capital unit cost for channel mileage-fixed is $8,253 for over eight miles while the cost for eight miles and under is $10,653. Sprint calculates that the depreciation and taxes claimed by SNET for multiplexing and the two channel mileage categories exceed SNET's operating expenses by 123 to 247 percent, prompting Sprint to conclude that SNET has increased its rate of return to an amount greater than 12 percent. Therefore, Sprint argues, SNET should be required to divulge the rate of return that it used to calculate its DS3 charges.[8] In addition, Sprint contends that SNET has exceeded the 8 to 1 crossover range set by the Commission in its *Strategic Price Order* for its month-to-month and three year commitment periods for DS1 to DS3 conversion. *Id.* at 5.

17. Sprint also objects to certain terms and conditions in Transmittal 480. Specifically, Sprint opposes SNET's grandfathering existing ICBs and suggests that SNET should permit its customers to convert from ICB rates to tariffed rates so that all DS3 facilities may be obtained based on generally available tariffed rates. *Id.* at 6. Second, Sprint objects to SNET's requirement that customers give three months notice prior to termination of DS3 facilities, rather than one month which is the industry standard.[9] *Id.* Third, Sprint asserts that the OPP that provides for the inclusion of existing and additional services under a new OPP for a commitment period equal to or longer than the original period is overly burdensome. *Id.* at 7. Under these terms, Sprint argues, the customer must commit to utilizing the existing facilities for the full amount of time of the original commitment, but not beyond the original commitment. *Id.* Fourth, Sprint maintains that providing month-to-month service with a minimum service period of one year may be excessively long for certain DS3 customers, noting that a customer cancelling after one month would be required to pay the full tariffed rate for 11 months. *Id.* at 8. Finally, Sprint claims that SNET's rate structure would be more complete and useful to its customers if it included the option of an optical channel interface for the interconnection with the customer instead of the electrical interface it proposes to use. *Id.*

18. SNET responds that its DS3 rate structure is identical to SNET's rate structure for DS1 service and all Special Access services. SNET Reply at 3. It contends that the Commission found a parallel rate structure used by Bell Atlantic to be suitable for a general DS3 offering.[10] SNET responds to Sprint's allegation that SNET's cost study was conducted as if only individual DS3 facilities are installed and operated, stating that its study did take into account efficiencies gained through additional circuits. SNET claims that discounted rates for additional circuits reflect lower costs for additional circuits. *Id.* at 4. With regard to the channel mileage element rate structure, SNET asserts that it does provide a discount for increased commitment, contrary to Sprint's claim. It states that the channel mileage rate for a 10 mile circuit is $2,750 for month-to-month, $2,500 for a three year commitment, and $2,250 for a five year commitment. *Id.*

19. SNET further argues that its "equal to or longer" option for the addition of DS3 service is not burdensome. It notes that the option would allow a customer in the fourth year of a five-year plan to add a DS3 service and gain the benefit of the five year plan discounted rate while only being obligated to retain that service for a year. *Id.* at 11. Moreover, SNET claims its 12 month minimum service period is similar to the minimum period established by many LECs, and assures that the substantial fixed costs incurred by SNET for this service are recovered by the cost causer. *Id.* In addition, SNET believes that the electrical interface connection for customers is appropriate for the DS3 generic tariff offering and is the industry standard interface. *Id.* at 12. Finally, SNET contends that its ICB contracts with DS3 service customers should be honored by the customer and itself until the expiration of the term, so that SNET is assured of recovering the full costs of providing the service.

III. DISCUSSION

20. The Common Carrier Bureau has reviewed the various transmittals before us in this proceeding as well as the pleadings. We find that no compelling argument has been presented that these tariff transmittals are patently unlawful so as to require rejection. However, the Bureau does find that these transmittals raise issues which warrant investigation. We will designate specific issues to be investigated in a subsequent Order which will also establish the filing procedures, information to be submitted by the carriers, and pleading cycles for this investigation.

21. We conclude also that the CBT and SNET transmittals should be subject to an accounting order. To enable us to impose an accounting order, we are suspending CBT Transmittal 535 and SNET Transmittal 480 for one day.

IV. ORDERING CLAUSES

22. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201-205, and 403 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 201-205, 403, and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that an investigation of the above-captioned tariff revisions IS INSTITUTED.

23. IT IS FURTHER ORDERED that the petition filed by MCI Telecommunications Corporation to suspend and investigate Cincinnati Bell Telephone Company, Tariff F.C.C. No. 35, Transmittal No. 535, and the petitions to suspend and investigate Southern New England Telephone Company, Tariff F.C.C. No. 39, Transmittal No. 480, filed by American Telephone and Telegraph Company, MCI Telecommunications Corporation, and US

Sprint Communications Company Limited Partnership, are GRANTED IN PART and are OTHERWISE DENIED.

24. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the subject tariff revisions ARE SUSPENDED for one day.

25. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 204(a) of the Communications Act, 47 U.S.C. §§ 154(i), 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, Cincinnati Bell Telephone Company and Southern New England Telephone Company shall keep accurate account of all amounts received pursuant to their respective DS3 rates which are the subject of this investigation.

26. IT IS FURTHER ORDERED that, Cincinnati Bell Telephone Company and Southern New England Telephone Company shall file a supplement reflecting the suspension of their respective DS3 rates for one day no later than November 20, 1989. For this purpose Special Permission No. 89-880 is assigned.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

FOOTNOTES

[1] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, 4 FCC Rcd 4797 (1988) (*Strategic Pricing Order), recon. pending.*

[2] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, Order Designating Issues For Investigation, 3 FCC Rcd 2582 (Com.Car.Bur. 1988)(*ICB Designation Order).*

[3] Private Line Rate Structure and Volume Discount Practices, CC Docket No. 79-246, 97 FCC 2d 923 (1984) (*Volume Discount Practices Order).*

[4] CBT cites CBT Transmittal No. 513, 1989 Annual Access Tariff Filing, filed Dec. 30, 1988, Volume 6, p. 23, Exhibit 6-14.

[5] *Volume Discount Practices Order*, 97 FCC 2d at 923, 947.

[6] SNET later revised this requirement in Transmittal No. 491, filed Oct. 26, 1989. Transmittal 491 would change the early termination liability included in Transmittal 480 from the net present value of the payments for the entire commitment period, to liability for the minimum commitment period, *i.e.*, one year, plus a percentage of the value of the OPP commitment depending on whether it is three (75 percent) or five (60 percent) years. SNET Tariff F.C.C. No. 39, 1st Revised Page 2-23, Section 2.11.1.1(B). In addition, SNET would reduce the customer termination notification period proposed in Transmittal 480 from three months to one month. *Id.* No petitions were filed against Transmittal 491.

[7] *Id.* at 5 (citing, *inter alia*, Investigation of Access and Divestiture Related Tariffs, 97 FCC 2d 1082 (1984); Amendment of Section 64.702 of the Commission's Rules (Second Computer Inquiry), 77 FCC 2d 1384 (1980), *recon.* 84 FCC 2d 50 (1980), *further recon.* 88 FCC 2d 512 (1981), *aff'd sub nom.* Computer and Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied,* 461 U.S. 938 (1983); Amendment of Section 64.702 of the Commission's Rules, 104 FCC 2d 958, 1064-66 (1986), *recon.* 2 FCC Rcd 3035 (1987), *further recon.* 3 FCC Rcd 1135 (1988).

[8] Sprint notes that the Commission has previously rejected strategically priced Special Access rates set to achieve over a 40 percent rate of return, citing Investigation of Special Access Tariffs of Local Exchange Carriers, Memorandum Opinion and Order, 2 FCC Rcd 3506 (1987).

[9] As discussed in note 8, *supra*, in Transmittal 491 SNET revised this proposed notice period to require only one month's notice prior to termination.

[10] *Id.* (citing Annual 1989 Access Tariff Filings, Memorandum Opinion and Order, 4 FCC Rcd 3638, 3697 (Com.Car.Bur. 1989)).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-3

In re Applications of

PYLE COMMUNICATIONS OF BEAUMONT, INC. — File Nos. BR-830401ZE and BRH-830331ZZ

For Renewal of Licenses
for Station KWIC and
KWIC-FM Beaumont, Texas

MEMORANDUM OPINION AND ORDER

Adopted: December 5, 1989; Released: December 18, 1989

By the Commission:

1. This proceeding involves the applications filed by Pyle Communications of Beaumont, Inc. for renewal of its licenses for Broadcast Stations KWIC and KWIC-FM. Now before the Commission are a Petition for Extraordinary Relief filed July 17, 1989 by John J. Durkay; and Comments filed July 26, 1989 by William J. Mason, August 1, 1989 by the Mass Media Bureau and August 2, 1989 by Durkay; a Joint Request for Approval of Settlement Agreement filed on August 11, 1989 and supplemented on August 25 and September 1, 1989 by Mason, the Beaumont Branch of the NAACP and the National Black Media Coalition (NBMC); and Comments filed August 24, 1989 by the Mass Media Bureau.

BACKGROUND

2. Charles Pyle is the sole stockholder of Pyle Communications. In 1981, Pyle Communications acquired the licenses for Stations KWIC and KWIC-FM, in Beaumont, Texas. On March 31, 1983, Pyle Communications filed applications to renew the stations' licenses. NBMC and the NAACP filed a petition to deny the renewal applications alleging that Pyle Communications had engaged in discriminatory employment practices. On March 26, 1987, the Commission denied the petitions to deny and granted short-term renewals of Pyle Communications' licenses. *Pyle Communications of Beaumont, Inc.*, 2 FCC Rcd 1793 (1987). The Court of Appeals overturned the short-term renewals and remanded the proceeding to the Commission for a hearing on the allegations of discriminatory employment practices. *Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501 (D.C. Cir., 1988). In compliance with the directive from the Court of Appeals, the Commission designated Pyle Communications' renewal applications for hearing. *Pyle Communications of Beaumont, Inc.*, 4 FCC Rcd 1254 (1989). NBMC and the NAACP were made parties to the proceeding.

3. During the course of the foregoing proceedings, bankruptcy proceedings were initiated against Pyle Communications, Charles Pyle, and his wife, Ida Pyle. On March 30, 1989, Durkay was appointed and qualified as trustee for Pyle Communications. On May 10, 1989, the Commission approved the assignment of the licenses for KWIC and KWIC-FM to Durkay. *John J. Durkay*, File Nos. BAL-890417EC and BAL-890417EF (Mass Media Bur. May 10, 1989). The United States Bankruptcy Court for the Eastern District of Texas then approved a plan under which Durkay would assign the licenses to Mason. Mason will pay $2.79 million, which will be applied to the administrative costs of the bankruptcy and the satisfaction of creditors' claims; $160,000 to the Internal Revenue Service for unpaid payroll taxes for Pyle Communications' employees; and up to $950,000 for any income taxes assessed against Durkay. None of the money paid will go to either Charles Pyle or Ida Pyle.

EXTRAORDINARY RELIEF

4. In the Petition for Extraordinary Relief, Durkay asks for permission to assign the licenses for KWIC and KWIC-FM pursuant to the policy enunciated in *Second Thursday Corp.*, 22 FCC 2d 515, recon. granted, 25 FCC 2d 112 (1970). The *Second Thursday* policy is an exception to the rule that a licensee may not freely transfer its station while there are unresolved questions concerning its qualifications to be a licensee. Under *Second Thursday*, a bankrupt licensee, whose renewal application is in hearing, may transfer its station license if:

> . . . the individuals charged with misconduct will have no part in the proposed operations and will either derive no benefit from favorable action on the [renewal and assignment] applications or only a minor benefit which is outweighed by equitable considerations in favor of innocent creditors. [citations omitted]

22 FCC 2d at 516 ¶ 5. Thus, the *Second Thursday* policy "accommodates the policies of the federal bankruptcy law with those of the Communications Act." *LaRose v. FCC*, 494 F. 2d 1145, 1147 n.2 (D.C. Cir. 1974).

5. Durkay argues that the proposed assignment complies with the *Second Thursday* doctrine because the proceeds from the assignment will be used to pay innocent creditors and the costs of the bankruptcy and because no significant benefit will accrue to Charles Pyle, the alleged wrongdoer. While the payments will relieve Charles Pyle of his liability for certain debts, Durkay argues that this cannot be deemed a cognizable benefit, because Pyle's debts will still exceed his assets and Pyle will still be subject to the claims of other creditors in further bankruptcy proceedings.

6. The Mass Media Bureau generally supports the grant of the request for extraordinary relief. It argues, however, that Mason's proposal to purchase the stations can be deferred pending the Commission's approval of an amendment to KWIC-FM's license that will allow it to upgrade its facilities and further that the assignment is subject to a finding by the Commission that Mason and Linda Gale White (who has been assigned 20 percent of Mason's interest) are qualified to be licensees. The Bureau argues that until these matters are settled it would be premature to close the record.

7. The proposed assignment is consistent with the *Second Thursday* policy. According to the Bureau, Charles Pyle is the only person involved in these transactions who has been implicated in the alleged misconduct. The record establishes that Charles Pyle and Ida Pyle will not receive a substantial benefit from any payment by Mason and that any minor benefit would be outweighed by the equitable considerations favoring innocent creditors. Although the assignments might indirectly benefit the Pyles by reducing their liability to third parties, this benefit does not preclude the transaction because the Pyles' debts will still exceed their assets and they will continue to be subject to the bankruptcy court. *Oyate, Inc.*, 3 FCC Rcd 6759, 6762 ¶ 23 (1988).

8. The Bureau has approved the amendment upgrading KWIC-FM's facilities. FM Broadcast Station Construction Permit, File No. BPH-870302NA, issued September 28, 1989. While the applications for assignment of the stations have been filed, the Bureau has not yet passed on the assignees' qualifications to be licensees. We will, therefor, terminate this proceeding conditioned on the approval of the assignment applications and the consummation of the assignment to Mason.

THE SETTLEMENT AGREEMENT

9. Concurrent with the filing of the Request for Extraordinary Relief, Mason, NBMC and the NAACP filed a Joint Request for Approval of Settlement Agreement. Under the terms of the settlement agreement, the parties request the dismissal of the Petition to Deny filed by NBMC and the NAACP, and NBMC and the NAACP agree to refrain from filing objections to the assignment applications.[1] Mason agrees to pay $78,561 in back pay to 10 individuals who were allegedly the victims of discriminatory employment practices by Pyle Communications; to implement affirmative action employment procedures and to maintain a dialogue with the NAACP; and to pay a sum, not to exceed $80,000, for the documented legal fees of the attorneys for NBMC and the NAACP. The parties submitted a copy of the settlement agreement; affidavits from their attorneys documenting $79,610.75 in attorney fees; and affidavits from principals of NBMC and the NAACP certifying that the Petition to Deny was not filed for the purpose of reaching a settlement.

10. We will approve the settlement agreement. The agreement complies with the Commission's policies as set forth in *Agreements Between Broadcast Licensees and the Public*, 57 FCC 2d 42 (1975). The agreement will expedite the resolution of the hearing proceeding. It provides that there will be a dialogue between the licensee and the NAACP and that the alleged discriminatory practices which precipitated the hearing will be eliminated, while guaranteeing that responsibility for the operation and control of the stations will be vested in the licensees. *Agreements Between Broadcast Licensees and the Public*, 57 FCC 2d at 47-48. Finally, the dismissal of the Petition to Deny filed by NBMC and the NAACP, the commitment to implement affirmative action procedures, and the removal of Charles Pyle and Ida Pyle, as principals, and Pyle Communications of Beaumont, Inc. as a Commission licensee, moots the issues raised in this proceeding and eliminates any need for the hearing contemplated by the Court of Appeals in *Beaumont Branch of the NAACP v. FCC*, 854 F. 2d 501 (D.C. Cir. 1988).[2]

11. ACCORDINGLY IT IS ORDERED, That the Petition for Extraordinary Relief filed July 17, 1989 by John J. Durkay IS GRANTED.

12. IT IS FURTHER ORDERED, That Joint Request for Approval of Settlement Agreement, filed August 11, 1989 and Supplemented on August 25 and September 1, 1989, by William Mason, the National Black Media Coalition and the Beaumont Branch of the NAACP, IS GRANTED.

13. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED; provided that if the applications for assignment of the licenses from John J. Durkay to William J. Mason are denied, or if the assignment to William J. Mason is not consummated, the actions taken herein shall be void.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] It is not necessary to determine if the agreement complies with the new requirements set forth in *Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants, and Other Participants to the Comparative Renewal Process and to the Prevention of Abuses of the Renewal Process*, 4 FCC Rcd 4780 (1989), because the allegations in the Petition to Deny filed by NMBC and the NAACP were designated for hearing before the new requirements were adopted. 4 FCC Rcd at 4788. Nor are the requirements applicable to the agreement by NBMC and the NAACP to interpose no objection to the assignment applications. 4 FCC Rcd at 4795 n. 67.

[2] The Commission will continue to closely scrutinize EEO allegations raised during renewal proceedings. Where, as in this case, such allegations raise substantial and material questions of fact under the Commission's EEO policy, the Commission will closely investigate such allegations and conduct a hearing when necessary. 47 U.S.C. §§ 309(d)(2) and (e). This Memorandum Opinion and Order does not change that policy in any way. *See* 47 C.F.R. § 73.2080.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-487

In re Applications of

GOODLETTSVILLE BROADCASTING COMPANY, INC.	File No. BPH-861215MI
SAR BROADCASTING, INC.	File No. BPH-861216MB
BLEDSOE COMMUNICATIONS, LTD.	File No. BPH-861216MD
HEIDELBERG-STONE BROADCASTING COMPANY	File No. BPH-861217MA
DG ENTERPRISES, INC.	File No. BPH-861217ML
GOODLETTSVILLE COMMUNITY BROADCASTING, INC.	File No. BPH-861217MM
RUDY A. LINDSEY, SR. and FAYE B. LINDSEY, Husband and Wife, A Tenancy by the Entireties, d/b/a LINDSEY CHRISTIAN BROADCASTING COMPANY	File No. BPH-861217MO
WILLIAM E. BENNS, III	File No. BPH-861217MQ
TENNESSEE WOMEN IN BROADCASTING, INC.	File No. BPH-861217MT
RICHARD S. FRANCIS	File No. BPH-861217NA
GOODLETTSVILLE ASSOCIATES	File No. BPH-861217NB

For a Construction Permit for a
New FM Station on Channel 246C2
at Goodlettsville, Tennessee

MEMORANDUM OPINION AND ORDER

Adopted: December 4, 1989; Released: December 20, 1989

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. On October 10, 1989, Goodlettsville Associates (Associates) filed an appeal, pursuant to 47 CFR 1.301(a)(1), from Administrative Law Judge (ALJ) Joseph Chachkin's *Memorandum Opinion and Order*, FCC 89M-2425, released October 5, 1989, dismissing its application. Associates' application was dismissed because the ALJ found that, although given ample notice and time to find a new transmitter site, Associates was guilty of "gross lack of diligence" and could not demonstrate "good cause" for its late-filed amendment. We affirm the ALJ for the reasons set out below.

BACKGROUND

2. This multi-party comparative case commenced with the designation of some twenty-two mutually exclusive applications for hearing. *Hearing Designation Order*, 3 FCC Rcd 6608 (1988). There, and at the outset, the Commission noted that "a preliminary examination of the applications has revealed that many of them are short-spaced to a proposal by Station WSEK- FM . . . Somerset, Kentucky . . . . This short-spacing is the subject of a pending Rule Making proceeding." *Id.*, at 6609. Nonetheless, the applicants were permitted to proceed to comparative hearing, subject expressly to the outcome of the Somerset rule-making proceeding.

3. Less than thirty days thereafter, on December 13, 1988, the Commission released its *Report and Order*, 4 FCC Rcd 3441 (1988), which, in pertinent part, granted WSEK-FM's proposal to upgrade its Somerset station to a Class "C2" FM facility. In so doing, however, the Commission noted that "[a]lthough the Somerset proposal is also short-spaced to seven of the twenty-two . . . Goodlettsville [applications], those applicants will be permitted to amend their applications to meet spacing requirements" resulting from its approval of the upgrade of the WSEK-FM frequency. Associates was there expressly identified as one of the seven "short-spaced" Goodlettsville applicants. *See* 4 FCC Rcd 3445, n. 18.

4. Accordingly, by *Order*, FCC 89M-212, released January 23, 1989, the ALJ directed the short-spaced applicants remaining in this proceeding to amend their applications to specify new transmitter sites not later than March 15, 1989. Associates, however, did not so amend; instead, it requested an additional period of time in which to file its conforming amendment. By *Order*, FCC 89M-1170, released April 13, 1989, the ALJ granted Associates such additional time (until April 17, 1989) within which to tender its conforming site amendment.

5. On the appropriate date, Associates filed an amendment which did not propose to change its transmitter site; rather, it proposed to eliminate its critical "short-spacing" problem to Somerset by employing new engineering guidelines adopted by the Commission in its *Report and Order* (*Amendment of Part 73 of the Commission's Rules to Permit Short - Spaced FM Station Assignments Using Directional Antennas*), 4 FCC Rcd 1681 (1989) (" *Directional Antennas* "). However, by *Memorandum Opinion and Order*, FCC 89M-1370, released May 8, 1989, the ALJ denied

Associates' amendment because the Commission's *Directional Antennas* Order on which Associates relied, had not became effective. Moreover, the ALJ additionally noted that the Commission had further specifically advised, in a *Public Notice* (Mimeo 2391), released April 13, 1989, that all applications seeking authority to permit short-spaced facilities pursuant to *Directional Antennas* " *would be returned if filed prior to the effective date of the rules.* " *See Order*, FCC 89M-1370, *supra* at para. 3 (emphasis added).

6. On June 15, 1989, the last day of the hearing, and fully three months after the ALJ's deadline for filing amendments specifying non-short- spaced transmitter sites, Associates filed a Petition for Leave to Amend now, for the first time, specifying a *new* transmitter site. Finding that Associates had "been guilty of [a] gross lack of diligence" and had failed to satisfy the "good cause" criteria specified in *Erwin O' Connor Broadcasting Company*, 22 FCC 2d 140, 143 (Rev. Bd. 1970), the ALJ rejected this eleventh- hour amendment. *Memorandum Opinion and Order*, FCC 89M-1926, released July 24, 1989. The ALJ there reasoned (at para. 5; footnote omitted):

> Associates was put on notice by the *Report and Order* in MM Docket No. 88-31 released December 13, 1988, that an amendment was required. The Presiding Judge's January 23, 1989 directive afforded the applicants ample time to find a new site. Associates knew or should have known that its earlier amendment was unacceptable. Associates gambled that it could stay at its originally proposed site instead of amending to a new site. Now that Associates has lost this gamble, it seeks to amend its application months after the amendment deadline. Associates' dilatory tactics will not be rewarded. In a similar situation, the Review Board found that though an applicant can "fight" rather than switch transmitter sites, it can not "proceed oblivious to the reasonable procedural restraints imposed by the presiding ALJ." *Cuban - American Limited*, 2 FCC Rcd 3264, 3265 (Rev. Bd. 1987).

The ALJ also considered Associates' claim that "a more lenient good-cause test should be applied since its amendment is intended to correct a disqualifying defect" and its reliance upon *Anax Broadcasting, Inc.*, 87 FCC 2d 483, 489 (1981). However, the ALJ responded (*id.*):

> [A]s pointed out in *Cuban - American*, the fact that a disqualifying issue is involved does not entirely relieve the applicant of its good cause responsibilities. *See* also *Horizon Broadcasting, Inc.*, 103 FCC 2d 656 (*Rev. Bd. Cuban - American*, Associates' gamesmanship can not be condoned and there are no equities which justify Associates' failure to meet the *O' Connor* good cause criteria.

7. Following the denial of Associates' attempted amendment to a new transmitter site, one of its opponents filed a motion to dismiss Associates application, based upon its lack of a viable transmitter site and its lack of demonstration of good cause to amend to a new site. Noting that denial of Associates' amendment left that applicant "without a viable transmitter site and lack[ing] good cause to amend to a new site," the ALJ found that no substantial and material questions of fact concerning the viability of Associates' original transmitter site remained, and dismissed Associates' application from this proceeding. *Memorandum Opinion and Order*, FCC 88M- 2425, released October 5, 1989. It is from this *Order* that Associates appeals.

DISCUSSION

8. On appeal, Associates reargues that "Commission case law supports acceptance of the amendment," and that its June 15 amendment was necessitated, not by its past actions, but as a result of the ALJ's *Order* rejecting its April 17 amendment. Appeal at 3-4. We reject Associates' assertion that the ALJ was responsible for its plight because of his denial of Associates' April 17th amendment. The record establishes that both the Commission and the ALJ afforded all applicants, including Associates, ample notice and opportunity to amend to select new sites to eliminate short-spacing problems. Twice the ALJ extended the time for Associates to amend, after all the other applicants had timely specified conforming sites. Nevertheless, Associates elected to attempt to eliminate its short-spacing problems by reliance on the Commission's *Directional Antennas* Order which was not in effect at the time it filed its amendment. Thus, we agree with the ALJ that in view of "the Commission's clear and repeated notice of the effective date of the new [*Directional Antennas*] rules" there is no merit to "Associates' attempt to excuse its earlier filing of a defective amendment on the ground that it was unaware that the new short spacing rules had not taken effect." *See Order*, FCC 89M-1926, at para. 4.

9. Here, Associates was on direct notice from the *Hearing Designation Order*, of its potential need to alleviate the short-spacing to the Somerset, Kentucky proposal, and by the April 1989 *Public Notice* advising applicants that attempts to utilize the *Directional Antennas* Order prior to the effective date of the rules contained therein, would result in the return of nonconforming applications. Applicants are bound by the Commission's Rules, and neither the ALJ nor the Board may ignore these specific Commission directives. *See Reuters Ltd., v. FCC*, 781 F. 2d 946, 950 (D.C. Cir. 1986); *See also Pueblo Radio Broadcasting Service*, 4 FCC Rcd 7510 (Rev. Bd. 1989); *Kerr County Broadcasting*, 4 FCC Rcd 5021 (1989); *Domega Broadcasting Corp.*, 4 FCC Rcd 1450 (1989); *Kerrville Radio*, 2 FCC Rcd 3441 (1987).

10. We also note in passing that, in its appeal, Associates also relies upon *Azalea Corp.*, 31 FCC 2d 561, 563 (1971), for the proposition that "no applicant has a vested interest in the disqualification of a competing applicant"; *Anax Broadcasting*, 87 FCC 2d at 489, "an amendment need not be accompanied by involuntary or unforeseen acts, where the amendment tends to remove a disqualifying defect and confers no comparative advantage"; and *Simon Geller*, 90 FCC 2d 250 (1982), where the Commission "restated its finding that due diligence requirement has been relaxed in order to moot disqualifying issues." Associates also relies on *Bison City Television 49 Limited Partnership*, 91 FCC 2d 26 (1982), where the Board allowed an applicant to file four post-designation amendments involving three financial proposals, and *Gilbert Broadcasting Corporation*, 91 FCC 2d 450 (1982), where the Commission indicated that the due diligence requirement should be construed to prevent disruption of the administrative process.

11. The general propositions which Associates extracts from these cases do not undermine the ALJ's rulings here. Those cases involved ascertainment, programming, financial, and ownership amendments which are not subject to the stricter foreseeability test for engineering amendments set out by the Commission in 47 CFR 73.5222(b)(1). *See also California Broadcasting Corp.*, 90 FCC 2d 800, 809 (1982); and *Cuban-American, supra.* Here, because Associates proposed to change its antenna site and engineering, its amendment was subject to the stricter standard, and Associates did not even attempt to demonstrate that it complied with this standard. On the contrary, it argues that the ALJ should have applied a more lenient good cause test than that set out in *Erwin O'Connor, supra.* The cases it relies upon simply do not support its contention.

12. The ALJ's rulings are also firmly supported by the Commission's recent admonition that, especially in multi-party comparative cases, there must be timely compliance with procedural and substantive rules including ALJ's prehearing orders. *Hillebrand Broadcasting Inc.*, 1 FCC Rcd 419 (1986) (subsequent history omitted). There, the Commission announced a marked change in policy for such proceedings, based on the recognition that delaying the initiation of new services does not serve the paramount public interest. Thus, the Commission stressed that applicant's "temporizing activities" should no longer be tolerated. *Hillebrand, supra,* at 420. In line with the Commission's admonition, this Board held in *Cuban-American, supra,* that where there are a number of other applicants who have prosecuted their applications in accordance with the procedural guidelines set out by the ALJ, Commission policy does not require the acceptance of late-filed and procedurally defective amendments even when the amendment was designed to correct a disqualifying defect. 2 FCC Rcd at 3265. Given the undisputed facts in this multi-party case, we affirm the ALJ's ruling applying *Cuban-American* to Associates' dilatory conduct. In light of the Commission's express admonition to Associates (and similarly situated applicants), Associates cannot meet the strict "unforeseeability" prong of the Commission's "good cause" test for post-hearing designation amendments. *See* 47 CFR §73.3522(b)(1); *Shoblom Broadcasting, Inc.*, 95 FCC 2d 446, 446 (Rev. Bd. 1983), *rev. denied,* FCC 84-119, released April 2, 1984, *aff'd by judgment sub nom. Royce International Broadcasting Co. v. FCC,* 762 F. 2d 138 (D.C. Cir. 1985). We have no alternative therefore, but to affirm the ALJ's reasonable exercise of his broad powers.

13. ACCORDINGLY IT IS ORDERED, That the Appeal of Goodlettsville Associates filed October 10, 1989 IS DENIED.

14. IT IS FURTHER ORDERED, That the petition for leave to amend filed November 3, 1989 by Goodlettsville Associates IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-422

In re Applications of

RADIO DELAWARE, INC. File No. BPH-870604MB

ADAMS BROADCASTING CORPORATION File No. BPH-870615MO

For Construction Permit
for a New FM Station
Delaware, Ohio

MEMORANDUM OPINION AND ORDER

Adopted: December 6, 1989; Released: December 20, 1989

By the Review Board: MARINO (Chairman), BLUMENTHAL, ESBENSEN.

1. The Board has before it the *Initial Decision*, 4 FCC Rcd 5555 (1989) (I.D.), of Administrative Law Judge James F. Tierney (ALJ) granting the application of Adams Broadcasting Corporation (Adams) for a Construction Permit to establish a new FM broadcast station at Delaware, Ohio. The ALJ held that Radio Delaware, Inc. (RDI) impermissibly attempted to deprive Adams of its transmitter site and therefore was basically unqualified to be a Commission licensee. Conversely, Adams was determined to be fully qualified to be a licensee. After reviewing the I.D. in the light of the briefs, oral argument held November 15, 1989, and our own independent examination of the record, we agree with RDI that a remand of the proceeding is necessary to determine whether Adams had reasonable assurance of its original transmitter site at the time it filed its application, and whether it falsely certified in its application that it had such assurance.

BACKGROUND

2. Some eight days before Adams filed its application, on June 7, 1987, JoAnne Adams, Adams' sole voting stockholder (owning a 20% equity interest), was shown several potential transmitter sites by Jesse Smith, a local realtor. She testified at hearing that she wanted to buy a particular site controlled by Clyde Gosnell ("the Gosnell site"), and that realtor Smith told her that the asking price for the approximately 32 acres was $1,500 per acre. The price was apparently acceptable to her. Tr. 581-582, 589. On the following day, she brought Smith a draft letter addressed to her stating:

> This letter will serve as notice to you that we have located a property . . . that fits the criteria for your antenna site . . . .
>
> * * *
>
> The owner has stated that they would consider the sale of the site on the following basis [blank lines follow]

Adams Exh. 5C. Smith signed the letter and inserted the owner's terms as "note this land is listed with us [the realty company] for sale to qualified buyer." *Id.* ; Tr. 74, 98-99, 583-84. However, Smith apparently did not view Adams as seriously interested in buying the site. He testified at hearing that she made no purchase offer, written or oral, and he characterized her inquiry about the property as:

> [S]he wanted to know if the site would be available, not necessarily actually to buy it, to just know it would be available to start her [FCC] proceedings for the purpose of obtaining the permit for a radio station.

Tr. 97-98. Nevertheless, on June 15, 1987, the Adams application was filed with the Commission. There, Ms. Adams certified that she had obtained reasonable assurance of the Gosnell site from Smith. (However, as detailed in the I.D. (paras. 9-23), it turned out that the Adams application erroneously specified geographical coordinates and complete engineering data for an entirely different site, one owned by Richard J. Solove ("the Solove site")).

3. On July 3, 1987, Ms. Adams wrote Smith a letter in which she stated the following:

> In the event that the [Gosnell] property . . . is sold, or any portion thereof, would you please advise me?
>
> Your [June 8] letter is on file with my application for an FM radio license in Delaware. It is my responsibility to keep current on the status of the potential site.

Adams Exh. 5D.

4. In the meantime, during the period from August 20 through September 5, 1987, RDI, upon learning of Adams "interest" in the Gosnell site, successfully negotiated an option to buy that property and amended its application to specify the land owned by Gosnell. However, in February 1988, after receiving an adverse FAA air hazard determination for the Gosnell site, RDI amended back to its original site. On March 1, 1988, a third party, having no connection with either applicant, contracted to buy the Gosnell property.

5. On May 4, 1988, RDI filed a Petition to Deny the Adams application with the Commission's Mass Media Bureau. RDI there asserted that Adams never had reasonable assurance of its proposed transmitter site, and had falsely certified that it did have such assurance because (1) Smith had not shown Adams the Solove site, (2) Solove never discussed site availability with Adams, and (3) the Gosnell site was now unavailable. Adams opposed the petition solely on procedural grounds, arguing that the

matter should more appropriately be raised post-designation by a petition to enlarge issues rather than by a pre-designation petition to deny. Adams did not specifically claim that it had a reasonable assurance of site availability.

6. Thereafter, on June 9, 1988, Adams filed a Petition for Leave to Amend to indicate that it had now obtained reasonable assurance for the Solove site. Adams explained that it had originally intended to specify the Gosnell site in its application, but had actually specified the Solove site instead because of an "inadvertent error" made by its consulting engineer. Adams further claimed that it had only learned of the site error on May 5, 1988, when it received RDI's Petition to Deny, and now chose to rely on the Solove site because the Gosnell site was no longer available. On June 22, 1988, RDI opposed the Adams amendment petition, claiming that Adams never had reasonable assurance of either the Solove or Gosnell sites and, therefore, that Adams did not have good cause for its amendment request.

7. When the *Hearing Designation Order*, 3 FCC Rcd 5489 (1988) (HDO) was ultimately released in this proceeding, the Bureau (1) accepted for reporting purposes Adams' late-filed amendment, (2) specifically disallowed any improvement in Adams' comparative position as a result of this amendment, and (3) dismissed RDI's Petition to Deny as an improperly-directed petition to enlarge issues. The HDO did not address the merits of RDI's allegations, but did specifically provide RDI "an opportunity to raise any allegations contained [in its Petition to Deny]" in a post-designation enlargement petition to be filed with the ALJ. *Id.*

8. On October 14, 1988, RDI filed a Motion to Enlarge Issues with the ALJ, again seeking site availability and false site certification issues against Adams. In Opposition, Adams claimed in part that the HDO's acceptance of its amendment, despite RDI's opposition to it, precluded RDI from challenging the amendment anew, and that its amendment was supported by good cause and was properly accepted. By *Memorandum Opinion and Order*, FCC 88M- 3907, released November 17, 1988, the ALJ denied the RDI motion, holding that: (1) the HDO expressly permitted RDI to renew its challenge to Adams' reasonable assurance of the Solove site; but (2) Adams' June 9, 1988 site amendment was, "in a sense", accompanied by good cause because it was necessitated by its engineer's inadvertent error (despite the fact that its original purported "reasonable assurance" of the Gosnell site, based only on communication with a realtor, was "somewhat illusory.") *Id.*, at paras. 9-10.

DISCUSSION

9. It is axiomatic that an applicant must have reasonable assurance of the availability of its proposed transmitter site when it originally files its application. *Port Huron Family Radio Inc.*, 4 FCC Rcd 2532, 2534-35 (Rev. Bd. 1989); *62 Broadcasting, Inc.*, 4 FCC Rcd 1768, 1773 (Rev. Bd. 1989); *Magdalene Gunden Partnership*, 2 FCC Rcd 5513, 5513-14 (Rev. Bd. 1987), *review denied*, 3 FCC Rcd 7186 (1988); *George Edward Gunter*, 104 FCC 2d 1363, 1364 (Rev. Bd. 1986); *Classic Vision, Inc.*, 104 FCC 2d 1271, 1273 (Rev. Bd. 1986), *review denied*, 2 FCC Rcd 2376 (1987); *South Florida Broadcasting Co., Inc.*, 99 FCC 2d 840, 842 (Rev. Bd. 1984); *cf. FM Application Processing*, 58 RR 2d 776, 782 (1985); *FM Applications*, 58 RR 2d 166, 167 (1985). Although reasonable assurance may be acquired in numerous ways, it requires at minimum "a meeting of the minds resulting in some firm understanding as to the site's availability." *Genesee Communications, Inc.*, 3 FCC Rcd 3595 (Rev. Bd. 1988); *accord Progressive Communications, Inc.*, 104 FCC 2d 329, 331 (Rev. Bd. 1986) (remand on site issue) and 3 FCC Rcd 5758, 5758-60 (Rev. Bd. 1988) (Decision) (applicant disqualified). And, while some latitude is afforded such "reasonable assurance" (*e.g.*, the applicant need not necessarily own the proposed site, and may even work out the final details for lease/ownership at sometime in the future, *see National Innovative Programming Network, Inc.*, 2 FCC Rcd 5641 (1987)), the Commission's basic "reasonable assurance" standard remains unaltered. *Dutchess Communications Corp.*, 101 FCC 2d 243 (Rev. Bd. 1985); *Shoblom Broadcasting, Inc.*, 93 FCC 2d 1027 (Rev. Bd. 1983), *rev. denied*, FCC 84-119, released April 2, 1984, *aff'd mem. sub nom. Royce International Broadcasting Co. v. FCC*, 762 F.2d 138 (D.C. Cir. 1985)(table), *cert. denied*, 474 U.S. 995 (1985).

10. The hearing below focused on Adams' inadvertent error in specifying the Solove site rather than the Gosnell site, and on its claim that RDI had impermissibly interfered with and deprived it of reasonable assurance of the Gosnell site. However, our review reveals that Adams' claim of initial reasonable assurance of the Gosnell site at the time its application was originally filed appears considerably more than "somewhat illusory." Here, Adams did not seek an option agreement through realtor Smith and never contacted the actual owner. The correspondence between Smith and Adams reveals only that the property was available for sale to any qualified buyer, but fails to demonstrate any "meeting of the minds" that Gosnell would hold the property available to Adams as a transmitter site. Also, Smith's testimony at hearing indicates that he never viewed Adams as seriously interested in purchasing the property, so much so that he never even contacted Adams to solicit a higher bid after RDI approached him with an offer of an option to buy the property. In sum, the record reveals a substantial and material question of fact, requiring a remand, as to whether Adams ever had reasonable assurance of the Gosnell site and whether it falsely certified that it had. If it did not have reasonable assurance, then the question of whether it had good cause for its June 9, 1988 amendment should be reevaluated by the ALJ. Further, the evidence adduced at the remand hearing may also prove relevant in evaluating whether RDI's actions in negotiating an option for the Gosnell site in August-September 1987 undermine its basic qualifications, as the ALJ held below.

11. ACCORDINGLY, IT IS ORDERED, That this proceeding IS REMANDED to the Presiding Officer for the adduction of additional evidence and the preparation of a Supplemental Initial Decision on the following issue:

> To determine whether Adams Broadcasting Corporation had reasonable assurance of the availability of the Gosnell transmitter site when it originally filed its application and, if not, whether it falsely certified that it had; and in light of the evidence so adduced, whether Adams Broadcasting Corporation is basically qualified to be a Commission licensee.

12. IT IS FURTHER ORDERED, That the burden of proceeding SHALL BE on Radio Delaware, Inc., and the burden of proof SHALL BE on Adams Broadcasting Corporation.

13. IT IS FURTHER ORDERED, That the "Objection to Appendix of Adams Broadcasting Corporation, and Motion to Strike" filed November 6, 1989 by Radio Delaware, Inc. IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 89-452

In the Matter of

Colorado Region Public
Safety Plan

ORDER

Adopted: December 8, 1989; Released: December 18, 1989

By the Chief, Private Radio Bureau and the Chief Engineer:

1. On August 14, 1989, the Colorado Area (Region 7) submitted its public safety plan to the Commission for review. The plan sets forth the guidelines to be followed in allotting spectrum to meet current and future mobile communications requirements of the public safety and special emergency entities operating in its region.

2. The Region 7 plan was placed on Public Notice for comments on October 3, 1989, 54 FR 41500 (Oct. 10, 1989). The Commission received no comments in this proceeding.

3. We have reviewed the plan submitted for Region 7 and find that it conforms with the National Public Safety Plan. The plan includes all the necessary elements specified in the *Report and Order* in Gen. Docket No. 87-112, 3 FCC Rcd 905 (1987), and satisfactorily provides for the current and projected mobile communications requirements of the public safety and special emergency entities in Colorado.

4. Accordingly, IT IS ORDERED that the Public Safety Radio Plan for Region 7 IS ACCEPTED. Furthermore, licensing of the 821-824/866-869 MHz band in Region 7 may commence immediately.

FEDERAL COMMUNICATIONS COMMISSION

Beverly G. Baker
Acting Chief, Private Radio Bureau

Thomas P. Stanley
Chief Engineer

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Local Exchange Carriers' Individual Case Basis DS3 Service Offerings	**CC DOCKET NO. 88-136**
GTE Telephone Operating Companies	**CC DOCKET NO. 89-305**
Revisions to Tariff F.C.C. No. 1	**Transmittal Nos. 506, 513, 517, 521, and 522**

MEMORANDUM OPINION AND ORDER

Adopted: December 6, 1989; Released: December 18, 1989

By the Commission:

I. INTRODUCTION

1. By this Order, we conclude our investigation of the individual case basis (ICB) rates and charges for Special Access DS3 and DS3-equivalent services of the Regional Bell Operating Companies (BOCs) and other local exchange carriers (LECs).[1] In general, we conclude that the LECs have failed to demonstrate that the ICB rates that they have filed for DS3 and DS3-equivalent services are lawful under Section 202(a) of the Communications Act, 47 U.S.C. § 202(a). We therefore direct the LECs to remove most ICB rates for DS3 and DS3-equivalent services from their tariffs and to file general rates for all DS3 and DS3-equivalent services, subject to limited exceptions that are discussed below.[2] In addition, we resolve the first issue designated in our investigation of the ICB DS3 rates of the GTE Telephone Operating Companies (GTOC) in CC Docket No. 89-305. [3]

II. BACKGROUND

2. On March 8, 1988, the Common Carrier Bureau (the Bureau) rejected a tariff filing of the Bell Atlantic Telephone Companies (Bell Atlantic) that proposed to establish certain ICB rates for DS3 services. The Bureau concluded that the rates proposed in that filing were unreasonably discriminatory and that the cost support materials that Bell Atlantic filed were deficient.[4] The Bureau also expressed concern that the continued use of ICB pricing for DS3 services might no longer be justified. The Bureau observed that this Commission permitted the use of ICB rates for certain services that telephone companies had not offered prior to the divestiture of the Bell System. As the Bureau noted, however, this Commission cautioned at that time that we expected rates and regulations for such services to be set out in the relevant tariffs as they were developed. *March 8 Order*, 3 FCC Rcd at 1622 (citing *Investigation of Access and Divestiture Related Tariffs*, CC Docket No. 83-1145, Phase I, 97 FCC 2d 1082, 1143 (1984)(*ECA Tariff Order*)).

3. On March 28, 1988, the Common Carrier Bureau released an Order initiating an investigation of a number of LECs' ICB rates and charges for Special Access DS3 and DS3 equivalent services.[5] That Order designated the following issues for investigation:

> (1) Should the local exchange carriers be required to offer DS3 services under a non-discriminatory averaged schedule of rates pursuant to Sections 201-203 of the Communications Act?
>
> (2) Is ICB pricing of DS3 services unreasonably discriminatory? Are similarly situated customers paying different prices for the same or comparable services?
>
> (3) Do the rates for DS3 service set by the local exchange carriers on an ICB basis constitute a justifiable volume discount in relation to the rates for DS1 and voice grade services? Local exchange carriers should address differences in rate relationships when similar facilities for voice grade, DS1, and DS3 services are employed. In addition, local exchange carriers should show how any differences between minimum service periods, termination liabilities, and any accelerated cost recovery over the relevant time period (front loading of costs) affect the rate relationships.[6]

4. The Bureau subsequently initiated three further rounds of pleadings in this investigation. First, the Bureau designated additional issues for investigation and required direct cases concerning the LECs' use of ICB rates for "dry" or "dark" fiber.[7] The Bureau noted that these services appeared to be DS3-equivalent services and therefore directed the LECs to

> (1) Explain whether the provision of dry fiber cable could or should be distinguished from the provision of DS3 and DS3-equivalent services with respect to the use of ICB rates.
>
> (2) Provide responses to the issues set out in the *Designation Order* . . . as applied to dry fiber cable.
>
> (3) If you contend that the issues in the *Designation Order* do not apply to the provision of dry fiber cable, provide a detailed explanation to support your position.[8]

5. In January 1989, the Bureau issued a Public Notice inviting a third round of public comments in this investigation.[9] The basis for the *NCI Public Notice* was a filing by Network Communications, Inc., (NCI) on the extent of competition for DS3 services.

6. During the pendency of this investigation, the Bureau accepted numerous LEC ICB filings for DS3 and DS3-equivalent services subject to the outcome of this investigation. As part of their annual 1989 access tariff filings, five of the BOCs filed tariff provisions that introduced general rates for DS3 service.[10] The Bureau also made these filings subject to the outcome of this investigation.[11] The Ameritech Operating Companies (Ameritech) and the Mountain States Telephone and Telegraph Com-

pany, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company (US West) have since filed general DS3 tariff provisions which became effective, also subject to the outcome of this investigation.[12] In the same Order in which it made the US West general DS3 tariff subject to the outcome of this investigation, the Bureau designated further issues for investigation. Those issues relate to the BOCs' general DS3 tariffs.

7. The Bureau's *1989 Access Tariff Order* stated that these tariffs do not completely resolve the issues previously designated for investigation and, indeed, present other questions that warrant investigation.[13] First, although the BOCs now have filed general rates for at least some DS3 rate elements, all of the BOCs still retain ICB rates in certain circumstances. For example, all BOCs that filed "general" DS3 tariffs continue to provide DS3 service arrangements that pre-date their general tariffs pursuant to ICB rates. In addition, various carriers continue to offer one or more DS3 rate elements on an individual case basis or to charge ICB rates for all DS3 rate elements under certain circumstances.[14] The Bureau therefore designated the following additional issues for investigation:

> (1) Is the continued use of ICB pricing for DS3 customers who commenced service prior to April 1, 1989, unreasonably discriminatory? Are similarly situated customers paying different prices for the same or comparable service?
>
> (2) Is the continued use of ICB pricing for one or more rate elements (*i.e.*, channel terminations, channel mileage) unreasonably discriminatory?
>
> (3) Is the continued use of ICB pricing in the following circumstances unreasonably discriminatory?
>
> (a) For customers ordering a particular number of DS3 services.
>
> (b) For customers ordering DS3 circuits of a particular length.
>
> (c) For customers ordering non-protected DS3 circuits.[15]
>
> (d) For customers ordering DS3 service from a customer premises to an exchange access boundary. In addition, should the exchange access boundary be treated as a customer premises?[16]

8. After the pleading cycle in response to these newly-designated issues was established, GTOC filed its general DS3 tariff. The Bureau chose not to include GTOC's tariff in the investigation in CC Docket No. 88-136 because it concluded that this would require the establishment of an additional pleading cycle and necessarily delay the resolution of the issues designated in this docket. In addition, the Bureau noted, GTOC's filing raises unique issues that it believed could best be addressed in a separate investigation. The Bureau therefore initiated the investigation of the GTOC tariff in CC Docket No. 89-305 and designated issues for investigation.[17]

9. The first issue designated in that investigation, however, is virtually identical to an issue in our broader investigation of ICB DS3 rates in CC Docket No. 88-136. Specifically, the Bureau asked,

> (1) Is the continued use of ICB pricing for DS3 customers who commenced service prior to July 3, 1989, unreasonably discriminatory? Are similarly situated customers paying different prices for the same or comparable service? GTOC should provide information concerning the number of individual case basis DS3 services it currently provides to ICs and to end users in each jurisdiction in which it provides service and for all its operating companies.[18]

The record in the GTOC investigation is now complete. The arguments advanced with regard to this issue are essentially the same as those raised in the pleadings responding to the first issue designated in the Bureau's *Second Supplemental Designation Order*. We therefore conclude that the first issue designated in the *GTOC Designation Order* should be resolved at this time.

III. SUMMARY OF PLEADINGS

A. *Grandfathering Existing DS3 ICB Rates* [19]

1. Supplemental Direct Cases

10. The LECs argue that we should permit grandfathering for several reasons. First, they contend that grandfathering represents a reasonable, limited measure to permit a smooth transition to averaged DS3 rates. Among other benefits, the LECs contend, grandfathering would avoid inconvenience and financial disruption for existing customers and would fulfill the settled expectations of these customers. *See, e.g.*, Ameritech Supplemental Direct Case at 4-5; US West Supplemental Direct Case at 8-10.[20] Moreover, Ameritech asserts, grandfathering is limited both in scope and duration. Ameritech states that only 39 customers are served under grandfathered ICB rates in its region and that grandfathered customers would be required to begin paying tariffed rates at the end of their current service terms. Ameritech Supplemental Direct Case at 3-5.[21] Several carriers also liken grandfathering of embedded DS3 ICBs to other transition plans that this Commission has adopted in the past.[22]

11. In BellSouth's view, ICB pricing has served the public interest. BellSouth argues that DS3 service represents the leading edge of technology and that cost and demand data were unknown when the service was first developed. Long term, stabilized rate contracts allow the carrier and customer reasonably to allocate the risks of developing a new service. BellSouth Supplemental Direct Case at 2-4. BellSouth further states that it cannot unilaterally modify existing ICB charges and that there is no reason for this Commission to do so. BellSouth argues that ICB charges are in the public interest because they have provided a mechanism for the development of new services. Any interference by this Commission with these contractual relationships, BellSouth contends, could only have a chilling effect on the development of new services. *Id.* at 4-5.

12. The LECs' other main line of argument is that grandfathering existing ICBs is not unreasonably discriminatory either because ICB customers and general tariff customers are not similarly situated or because the rates are in both cases based on costs. Ameritech asserts that customers who ordered DS3 service after the effective date of general tariffs are different as a group than customers

that ordered service prior to that date. Thus, Ameritech concludes, no discrimination exists. According to Ameritech, "the difference lies in each group's position in time relative to the Bureau's directive to exchange carriers to alter the way in which they are offering DS3 service." Ameritech Supplemental Direct Case at 4. In addition, NYNEX asserts, these two different groups of customers may have entirely different service requirements. Although the ICB subscriber may pay greater or lesser charges than the prevailing tariff rates, any difference in charges under the two methodologies is not unreasonably discriminatory because the ICB customer selected the fixed ICB contract. NYNEX Supplemental Direct Case at 6-7.[23]

13. GTOC argues that grandfathering is not unreasonably discriminatory because it used rigorous costing methods to develop its ICB rates, which it argues are therefore reasonable. GTOC Supplemental Direct Case at 4-5. Southwestern contends that grandfathering is not unreasonably discriminatory because its general DS3 rates do not differ appreciably from its ICB rates. Southwestern maintains that it is commonly accepted that customers that obtain service at different times may pay different rates. Even under its general tariff, Southwestern states, different customers will pay different rates based upon the date the customer requested service, the minimum billing period, and the number of DS3 circuits ordered. Southwestern Supplemental Direct Case at 8-10.

14. Finally, the United Telephone Companies (United) state that their various operating companies provide DS3 service to two customers -- one in Ohio and the other at two locations in North Carolina. United contends that the ICB rates that it has filed to date have been fully cost-justified. United argues that it would not be able to develop general DS3 rates on the basis of such limited cost and demand information. United concludes that it should therefore be permitted to continue to use ICB rates for DS3 service until sufficient demand exists to permit the use of averaged rates. United Supplemental Direct Case at 1-2.

15. In its direct case in CC Docket No. 89-305, GTOC argues again that grandfathering is not unreasonably discriminatory. GTOC reiterates its view that ICB customers and general tariff customers are not similarly situated and that as a result there can be no unreasonable discrimination. In addition, GTOC contends, policy reasons also advanced by other LECs support grandfathering. Finally, GTOC argues, changes in technology and service applications have significantly altered the costs of provisioning DS3 service. Converting grandfathered ICBs to tariffed rates could thus lead to a disparity between costs and rates, GTOC concludes. GTOC Direct Case in CC Docket No. 89-305 at 4-7.

2. Comments and Oppositions

16. Seven parties filed pleadings in response to the LECs' supplemental direct cases.[24] AT&T agrees with the LECs that grandfathering should be permitted as a transition mechanism. AT&T states that the general rates filed by the LECs are in many cases significantly higher than the ICB rates that it currently pays. AT&T Supplemental Comments at 3-4. In particular, AT&T expresses concern that conversion to general rates could produce severe consequences in cases in which AT&T has already incurred substantial initial nonrecurring charges for its long-term ICB arrangements. *Id.* at 4-6.[25]

17. EDS states that the ICB prices it negotiated accurately reflect the costs of providing DS3 service over the varying service terms of the contracts. EDS therefore supports grandfathering. EDS Supplemental Comments at 4. In EDS's view, the public would be better served by a gradual transition to averaged DS3 rates as new customers subscribe to this service. EDS asserts that marked discrepancies in rates that cannot be justified on the basis of differing cost characteristics can be remedied through the complaint process. *Id.* at 5.

18. The remaining commenters oppose grandfathering. MCI argues that grandfathering will perpetuate the unreasonable discrimination that currently exists among similarly situated ICB customers and will result in unreasonable discrimination between ICB customers and customers that must take service under the LECs' general tariff. MCI Supplemental Opposition at 6-8.

19. MCI also argues that the LECs' justifications for grandfathering are unpersuasive. First, MCI contends, the timing of the purchase of the service is irrelevant in determining whether the customers are similarly situated if two customers are receiving the same service and the underlying costs are the same. MCI also notes that the LECs have admitted in previous filings that the customer's willingness to pay and the availability of competitive alternatives are important factors in ICB pricing. *Id.* at 8-9.

20. MFS, Locate, and TCG agree that grandfathering ICB DS3 services would perpetuate and exacerbate existing unlawful discrimination. MFS and Locate contend that any ICB service initiated after March 28, 1988, the date on which this investigation was instituted, should become subject to averaged rates as soon as practicable. For ICB services initiated prior to the institution of this investigation, MFS and Locate propose that current rates be grandfathered for one year. MFS Opposition at 19-20; Locate Supplemental Opposition at 5. TCG proposes a two-year transition period. TCG Supplemental Opposition at 3-4.

21. Locate and MFS also contend that all of these DS3 services, whenever ordered, are functionally equivalent and that the LECs' explanations for rate disparities are unpersuasive. Rather, they contend, differences in rates for grandfathered ICB DS3 services and services ordered under the general tariff result from the BOCs' ability to undercut rates offered by emerging competitors. Nor do these parties believe that competitive necessity arguments justify grandfathering. MFS and Locate note that the LECs faced less competition when the grandfathered rates were filed than they do now. Locate Opposition at 5-6; MFS Opposition at 20-22.

22. Moreover, they argue, rate shock and other equitable concerns raised by the LECs do not justify grandfathering ICB rates filed after the investigation was instituted because both customers and carriers were on notice as of March 28, 1988, that the lawfulness of such rates was subject to investigation. Any rate shock that might result from the abrogation of ICB contracts is attributable to the LECs' decision to continue ICB ratemaking after this Commission indicated that the lawfulness of such rates was subject to investigation. Locate Opposition at 7-8; MFS Opposition at 22.[26] Locate also asserts that grandfathering is particularly unreasonable because the BOCs have secured service commitments of three to five years, thus locking customers into the BOC-provided service. Locate Opposition at 8. MFS argues that

allowing grandfathering would provide carriers a perverse incentive to delay the outcome of an investigation as long as possible while attempting to eviscerate an adverse determination by seeking to grandfather discriminatory rates for as many users as possible. MFS Opposition at 22.

23. TCG argues that the ICB customers' option to convert to general rates does not justify grandfathering. TCG notes that customers enjoying an unduly preferential rate will be unlikely to exercise this option. *Id.* at 5. TCG also notes that the LECs' arguments that ICB customers and general-rate customers are not similarly situated ignores the discrimination among ICB customers that initially gave rise to this investigation. *Id.* Finally, TCG notes, the question whether ICB rates are compensatory is not relevant to the issue of discrimination. *Id.* at 6.[27]

24. CTI does not address the designated issues because it contends that the LECs have not provided information that would allow a comparison of the costs of ICB services and DS3 services provided under tariff. CTI Comments at 6. CTI expresses the suspicion, however, that the LECs have been overcharging ICB customers and that conversion to general rates would require customers to pay substantial termination charges which it argues would be a windfall to the LECs. *Id.* at 8-9. CTI also observes that the LECs have significant competitive advantages, and that most of the plant used to provide DS3 service is already in service. CTI concludes that the levels of the LECs' averaged rates indicate that competitive rate levels rather than costs are the basis of the rates. *Id.* at 9-10.

25. Four of these parties also filed pleadings in response to GTOC's direct case in CC Docket No. 89-305.[28] The arguments contained in these pleadings do not differ significantly from the positions these parties have taken with respect to other LECs' grandfathered ICB rates.[29] Among these parties, only AT&T argues that grandfathering should be permitted. AT&T Comments in CC Docket No. 89-305 at 2-4. US Sprint argues that GTOC has not justified grandfathering and contends that ICB customers should be given the option of converting to general rates. US Sprint Comments in CC Docket No. 89-305 at 3-5. MCI and Intermedia/Locate restate the arguments against grandfathering contained in their earlier-filed oppositions to the direct cases in CC Docket No. 88-136. MCI Opposition in CC Docket No. 89-305 at 5-11;[30] Intermedia/Locate Joint Opposition in CC Docket No. 89-305 at 4-7.

3. Rebuttals

26. The LECs generally reiterate their earlier contentions and also advance a variety of responsive arguments in their rebuttals. First, they argue that converting existing ICB arrangements to tariffed rates would be inequitable and that grandfathering these arrangements would be reasonable. For example, Ameritech states that grandfathering would avoid inconvenience and financial disruption and asserts that it would affect relatively few customers for a limited time. Ameritech Rebuttal at 11. BellSouth contends that the extended minimum service periods that are part of the DS3 ICB arrangements are consistent with the public interest because those arrangements allowed introduction of new technologies. BellSouth Rebuttal at 7. Southwestern argues that, although it claims its averaged rates are essentially the same as its ICB rates, converting existing ICB customers to general tariff rates "would fly in the face of rate stability as a concept." Southwestern Rebuttal at 7.

27. NYNEX argues that eliminating grandfathered ICB rates will give competitive service providers an unfair advantage. NYNEX notes that its competitors do not claim to provide DS3 service at averaged rates. Rescission of ICB rates would thus allow alternative service providers to "siphon away" customers at rates based not on their own costs of providing service but on the basis of the LEC's averaged cost. NYNEX Rebuttal at 3-4.

28. The LECs also oppose the proposal advanced in several of the oppositions to limit the scope and duration of grandfathering. Bell Atlantic notes that the Bureau has not found the use of ICB rates to be unlawful *per se*, and concludes that grandfathered ICB rates should therefore all be permitted to remain in effect.[31] In addition, Bell Atlantic argues, this would be consistent with a policy of treating grandfathering as a transitional mechanism to tariffed rates and would fulfill ICB customers' reasonable expectations. Bell Atlantic Rebuttal at 2-4. US West concurs in this analysis. US West also argues that customers that ordered ICB DS3 service after the institution of this investigation should not be punished for making necessary business decisions in an uncertain regulatory environment. US West Rebuttal at 5. Finally, GTOC argues that selective grandfathering could cause it to underrecover its revenue requirement. GTOC Rebuttal at 3-4.

29. The LECs also argue that grandfathering is legally appropriate. First, several LECs contend that no party has demonstrated that ICB rates are unlawful *per se*. Pacific Rebuttal at 1-2; BellSouth Rebuttal at 8; GTOC Rebuttal at 4. Similarly, Ameritech contends that the argument that grandfathering would only continue unlawful discrimination could only be correct if this Commission finds that the ICB contracts were unlawful *ab initio*. Ameritech Rebuttal at 9.

30. Ameritech also argues that ICB customers and general tariff customers are not similarly situated because ICB customers pay rates designed to recover the cost of their particular service over the life of the contract while tariff customers pay, in part, averaged rates, which are designed to recover a portion of averaged DS3 costs. Ameritech Rebuttal at 10. BellSouth asserts that, even if it were possible for it to compute averaged rates for its Point-to-Point DS3 service (which is currently offered on an individual case basis) it would have to change the technical specifications of the service offering to do so. ICB customers and tariff customers would thus not be similarly situated because the service offering would be different. BellSouth Rebuttal at 8 n.15.[32] Southwestern also observes that customers are not similarly situated if the customers are not receiving like services but does not elaborate on the differences between ICB and general rate customers' services. Southwestern Rebuttal at 4.

31. The LECs also reiterate that grandfathering is not unreasonably discriminatory because the differences in rates among ICB customers and between ICB customers and general rates customers are based on differences in costs. *E.g.*, NYNEX Rebuttal at 2-3. Moreover, NYNEX notes that its general tariff rates for DS3 service are based on projected costs and demand for the 1989 access year. According to NYNEX, it may not be appropriate to extend these rates to ICB customers who commenced service in other years when cost and demand projections might have varied. *Id.* at 3.

32. Southwestern further contends that its ICB rates are not unreasonably discriminatory because "absent competitive necessity or costs that exceed rates, [Southwestern] charged the same rate to DS3 customers under like conditions." Southwestern Rebuttal at 5. Southwestern concludes that its rates were not unreasonably discriminatory because it deviated from its price matrix only when "justified by competitive necessity or recovery of costs." *Id.* Southwestern also rejects MCI's suggestion that its DS3 rates should be targeted to earn its authorized interstate rate of return of 12 percent. Southwestern notes that "an attempt to allocate costs to individual subelements . . . would, at best, achieve an illusory precision. Therefore, it would be impossible to separate costs for DS3 services from the special access category." Nevertheless, Southwestern assures us, rates for DS3 services "were consistently set at or above costs and were based on market factors." *Id.* at 7-8.[33]

33. In its rebuttal in CC Docket No. 89-305, GTOC notes that AT&T and US Sprint concede that grandfathering may be necessary as a transition mechanism. GTOC also observes that, to date, this Commission has not found ICB rates unreasonably discriminatory or required general rates for DS3 service. GTOC Rebuttal in CC Docket No. 89-305 at 4-5. Next, GTOC attempts to explain the bases for disparities among grandfathered ICB rates and between these ICB rates and general tariff rates for apparently similar services. GTOC concludes that grandfathering is not unreasonably discriminatory because its ICB rates were developed to reflect the costs of providing service. *Id.* at 5-6. Finally, however, GTOC states that it would not oppose allowing its ICB customers to selectively migrate to general rates provided that the LEC's interests are safeguarded in this transition process. *Id.* at 6-7.

B. ***Use of ICB Rates for Individual Rate Elements and Particular Types of DS3 Circuits***

1. Supplemental Direct Cases

34. The LECs generally argue that several factors justify ICB treatment for particular rate elements or particular types of circuits. Ameritech, for example, argues that the costs of DS3 LDCs are unique. According to Ameritech, facilities for DS3 service are not ubiquitous. Most DS3 LDCs are for service to interexchange carriers' (IC) points of presence (POP) and the large concentrations of traffic from these service applications lead to economies of scale. Ameritech also contends that costs vary based on the length of the contract negotiated, the number of circuits requested, and the physical characteristics of the new DS3 installation, among other factors. Ameritech Supplemental Direct Case at 8-10. Ameritech provides examples of two apparently similar DS3 circuits for which it argues the costs vary dramatically. *Id.* at 10-11. Ameritech concedes that "[t]he upshot of these two cases is hardly unique for DS3 service," *id.* at 11, but concludes that because of the cost differences it has identified, these customers are not similarly situated and therefore ICB rates are appropriate. *Id.* at 13.[34]

35. In addition, Ameritech asserts that the DS3 LDC universe is too small to form the basis for averaged rates. Ameritech states, however, that it will continue to use consistent methods for costing and pricing DS3 LDCs. *Id.* at 14. Finally, Ameritech argues that ICB rates are justified for DS3 LDCs because averaged rates would hamper its ability to compete in the marketplace for what it asserts are essentially the customized aspects of high capacity service. *Id.* at 16.

36. In response to Issue 3 in the Bureau's *Second Supplemental Designation Order*, which discusses particular applications of ICB pricing in the BOCs' general tariffs, the LECs argue that the unique nature of particular types of DS3 circuits justify ICB treatment. NYNEX, for example, asserts that the electronics for services of more than 12 coterminous DS3 circuits are not yet standardized. NYNEX argues that until such facilities are ubiquitous, costs and demand will not stabilize and averaged rates cannot accurately reflect the costs of providing such a service. NYNEX Supplemental Direct Case at 11. Southwestern contends that it decided to retain ICB rates in three situations because the costs of these services vary and demand is low. Southwestern Supplemental Direct Case at 11.[35] Southwestern also asserts that ICB pricing is appropriate for DS3 circuits to an Exchange Access Boundary (EAB) because these orders account for only 2 percent of Southwestern's demand and because they do not conform to the technical parameters for DS3 service. *Id.* at 14.

37. These carriers also argue that other reasons support ICB pricing in the cases outlined in Issue 3. NYNEX asserts that its ICB rates for orders of more than 12 coterminous DS3s are not discriminatory because customers have the option of choosing averaged or ICB rates. Thus, NYNEX concludes, ICB customers are not discriminated against vis-a-vis general tariff customers. Moreover, NYNEX asserts, customers for fewer than 12 DS3s are not discriminated against because they are not similarly situated. NYNEX Supplemental Direct Case at 9 & n.22.

38. NYNEX also believes that its ability to discriminate between two optional ICB customers "is severely constrained and subject to easy detection." *Id.* at 10. According to NYNEX, ICB rates are based on costs. NYNEX states that if two orders are similar the costs should be similar, which should result in the same rates being applied to the two orders. Discrimination would therefore be easily detected in the review of the ICB filings, NYNEX contends. Furthermore, NYNEX argues, the sophisticated customers that would be likely to order such large amounts of capacity know what the costs of their service should be and they are also the most likely candidates to receive competitive offers. *Id.*

39. Southwestern states that its customers have unique needs and that it must have the flexibility to meet those needs. Otherwise, Southwestern contends, its competitors will price services below Southwestern's averaged tariff rate and will capture all low cost applications. As a result, Southwestern argues, its rates will be driven higher. Southwestern Supplemental Direct Case at 11. Similarly, US West argues that ICB pricing is appropriate whenever customer needs are unique or orders for a type of service are few. US West contends that attempting to develop averaged rates without an adequate track record could result in rates that are unrelated to costs. Moreover, US West asserts, if LECs are not permitted to use ICB pricing in these situations customers will take their business elsewhere and the LECs will never have sufficient demand to develop an averaged rate. US West Supplemental Direct Case at 14-15.

2. Comments and Oppositions

40. AT&T and EDS again support the LECs' assertions that ICB pricing is appropriate in the situations discussed in the *Second Supplemental Designation Order*. AT&T advocates ICB pricing when alternate or diverse route protection capabilities are required. AT&T states that cost characteristics for these services may differ from general tariffed offerings. AT&T Supplemental Comments at 7. EDS supports ICB pricing for any DS3 service element for which averaging will not produce fair rates based on costs. EDS Supplemental Comments at 6. EDS notes that many DS3 applications involve unique engineering and special facilities. *Id.* at 7. ICB rates should therefore be permitted, EDS concludes, if the carrier can justify such treatment based on varying cost characteristics. *Id.* at 8. Finally, EDS states that rate averaging is intended to promote universal service and to protect rural ratepayers – considerations which are not relevant in the context of DS3 service. *Id.* at 8 n.16.

41. Other parties oppose ICB treatment in these circumstances. MCI contends that permitting ICB rates for one rate element, particularly the channel termination, effectively makes the entire service subject to ICB pricing. MCI Supplemental Opposition at 15. Moreover, MCI and others argue, the LECs have not demonstrated that the costs of these rate elements and service applications cannot be averaged. They note that these arguments are undercut by the fact that Bell Atlantic has filed fully averaged rates for DS3 service. MCI Supplemental Opposition at 16-18; Locate Supplemental Opposition at 10-13; MFS Supplemental Opposition at 12-13, 16-18; TCG Supplemental Opposition at 8.

42. These parties also argue that the factors which the LECs use in their efforts to distinguish DS3 applications for which ICB treatment is appropriate are not unique to DS3 service. Locate, for example, argues that facilities used to provision any service can be disaggregated to demonstrate that costs of serving different customers vary widely. Locate Supplemental Opposition at 12; MCI Supplemental Opposition at 19-21. They also contend that assertions of uniqueness can be abused to justify discriminatory pricing. MCI Supplemental Opposition at 18-19. MCI further notes that it would be impossible to monitor the hundreds of individual contracts that would result from the continued use of ICB pricing and that ICB pricing invites discrimination. MCI Supplemental Opposition at 21. Similarly, MFS believes that permitting ICB rates in particular circumstances would allow the LECs virtually unchecked flexibility to favor select customers. MFS Supplemental Opposition at 6-7.

43. MFS also contends that selective ICB pricing would create perverse incentives. For example, MFS argues, Southwestern would be encouraged to route DS3 circuits inefficiently in order to provide a special rate for a favored customer. MFS Supplemental Opposition at 9-10. MFS also rejects NYNEX's contention that unreasonable discrimination is not a concern because large customers are sophisticated enough to recognize it. Moreover, MFS notes, these sophisticated large customers are not the likely victims of discrimination. MFS Supplemental Opposition at 15. Finally, the opponents argue that assertions of competitive necessity do not justify ICB pricing. TCG argues that effective competition does not exist in the absence of equivalent central office interconnection. TCG Supplemental Opposition at 8-9.

3. Rebuttals

44. In response to the oppositions, the LECs pursue three arguments in support of specialized uses of ICB pricing for DS3 service applications. First, they repeat their contention that unique cost and demand characteristics justify the ICB rates for particular rate elements or service configurations. Ameritech states that it cannot be disputed that there are cost differences among DS3 LDCs and the limited demand universe for the service renders available information a poor basis for averaged rates. Ameritech Rebuttal at 4-5; *see also* Pacific Rebuttal at 3-4.[36] Ameritech expands on this argument, explaining that it is not the absolute number of DS3 LDCs in service, but the lack of stability of the customer population that makes historical costs a poor basis for averaged rates. Ameritech Rebuttal at 8-9. NYNEX and Southwestern also reiterate their earlier arguments to the same effect. NYNEX Rebuttal at 4-5; Southwestern Rebuttal at 9-14.

45. Next, the LECs repeat their assertions that competition in the market for DS3 services justifies the use of ICB rates in specific circumstances. Ameritech contends that no party has demonstrated that the LECs' ICB rates undercut competition and asserts that its ICB rates exceed costs and are therefore by definition not predatory. Moreover, Ameritech observes, the Communications Act's prohibition against unreasonable discrimination was intended to protect a carrier's customers and not its competitors. Ameritech Rebuttal at 12-13. Southwestern notes that its ICB rates, while covering costs, are based on marketplace considerations. Southwestern concedes that rates could be developed on a simplistic averaged basis, but that this would not allow Southwestern to respond effectively to its customers' needs. Southwestern Rebuttal at 11-12.

46. Finally, Ameritech asserts that public policy does not support averaged rates for DS3 services. Ameritech reiterates the argument that the basis of ratemaking for DS3 service has nothing to do with Commission concerns for the promotion of universal service or the protection of poor or rural ratepayers, factors which Ameritech asserts have been the basis for averaged rates in the past. Ameritech Rebuttal at 6-8.[37] Further, Ameritech argues, if this Commission holds that the Act requires averaged rates, this holding would apply equally to all carriers, including its competitors, and not just to the LECs whose tariffs are the subject of this investigation. Ameritech Rebuttal at 17-18.[38] Different regulatory treatment for dominant and non-dominant carriers, Ameritech argues, would be neither lawful nor sound policy. Ameritech asserts that when the allegedly discriminatory rate is a competitive response, the LEC is not "dominant" in that situation. . . . Certainly, where the customer is seeking competitive bids or proposals or has the option to obtain service from various carriers, there cannot be an assumption that one carrier in the process is dominant.

Id. at 19.

C. *Extent of Competition for DS3 Services*

1. NCI Comments

47. On December 1, 1988, Network Communications, Inc. (NCI) submitted comments in which it argues that the LECs' existing DS3 ICBs are unreasonably discriminatory and appear to be cross-subsidized by monopoly

services. NCI expresses concern that ICB pricing would be subject to abuse and recommends that this Commission require LECs to file averaged rates for DS3 services.

48. NCI discusses the extent of competition in the market for DS3 services. NCI notes that Southwestern had contended that there are 23 competitive providers of DS3 service in the states in which it operates. NCI argues that this estimate is inflated because nine of the companies listed by Southwestern are manufacturers of microwave equipment and, therefore, rather than being competitors, are Southwestern's suppliers. Of the remaining 14 companies that Southwestern lists as competitors, NCI states, seven are ICs and are thus not competitors but customers of Southwestern. NCI notes that the ICs do not have networks in place locally that are competitive with Southwestern and that they do not have local rights of way, and thus cannot "install their own links around the LEC." NCI Comments, filed Dec. 1, 1988, at 4-5. As noted above, the Bureau sought public comment on NCI's arguments, particularly its assessment of the extent of competition for DS3 services. *See NCI Public Notice*.

2. Comments

49. In response to the Public Notice, four BOCs and six other parties filed comments. The BOCs disagreed with NCI's comments. The six remaining parties, which all concede that they offer competitive DS3 services, argued that effective competition does not exist and that ICB pricing should not be permitted.[39]

50. Intermedia's comments are representative of this group. Intermedia contends that this Commission's analysis of competition should include all local transport services. Intermedia argues that other services, particularly DS1, provide close substitutes for DS3 service and that, when analyzed as part of this larger market, it is clear that the BOCs face no effective competition. Intermedia Comments, filed Feb. 10, 1989, at 5-6. Even if the relevant market is limited to DS3 service, however, Intermedia argues that the BOCs are dominant. Intermedia notes that the mere presence of a competing provider of DS3 service in a market does not mean that the market is competitive. Intermedia notes that it currently provides only five DS3 circuits in Florida whereas BellSouth projects that its average demand for DS3 service in Florida in 1989 will be 124 circuits.[40] *Id.* at 6-7. Moreover, Intermedia argues, the BOCs' pricing practices illustrate their market dominance. Intermedia notes that the BOCs have priced DS1 rates strategically in order to manage demand migration and argues that DS3 rates are also strategically set. *Id.* at 8-11; *see also* Locate Comments, filed Feb. 10, 1989, at 9 n.20.

51. Locate notes that it currently provides a total of 50 DS3 circuits in the six states in which it is most active. In contrast, it states, the BOCs project DS3 demand of 492 circuits in those study areas. Locate Comments at 7. MFS states that Illinois Bell provides 4,021 DS1 circuits and 108 DS3 circuits while MFS's "3.4 mile fiber system carries only a small fraction of this traffic." MFS Comments, filed Feb. 10, 1989, Statement of Anthony J. Pompliano at 4. In Philadelphia, MFS expects to attain a market share of no more than 5 percent of Bell of Pennsylvania's demand even under its most optimistic projections. *Id.* at 5. Finally, TCG urges us to adopt a "reasonable investor" test of competition. TCG states that if NCI, or another potential competitor, regards the LEC's rates as predatory and preemptive, these rates will, in fact, preempt competition. TCG Comments, filed Feb. 10, 1989, at 6-7.[41]

52. The BOCs renew their contentions that they face extensive competition in the DS3 market.[42] Southwestern reiterates that its ICB rates are set above cost and are not unreasonably discriminatory. Southwestern Comments, filed Feb. 10, 1989, at 4-7. Southwestern also asserts that all of its DS3 services, including hubbed services, are subject to competition. In addition, Southwestern contends that it does not possess market power because both substitutable products and potential competitors are present in the DS3 market. *Id.* at 7-10. NYNEX also argues that substantial competition exists in its region for the provision of High Capacity services. NYNEX Comments, filed Feb. 10, 1989, at 2. According to NYNEX, TCG provides formidable competition, having connected 80 buildings in Manhattan to its fiber optic network. *Id.* at 2-3. NYNEX estimates TCG's current customer base at 1,800 DS1 equivalent circuits which it contends is approximately 25 percent of the number of DS1 circuits New York Telephone provides in the entire state of New York. *Id* at 3. NYNEX also lists several other current and potential competitors in New York and New England. *Id.* at 4-5.[43] US West agrees that the DS3 market is competitive and asserts that LECs must have pricing flexibility in order to compete. US West Comments, filed Feb. 10, 1989, at 3.

53. Ameritech submitted the most extensive filing in response to the *NCI Public Notice*. Ameritech's formal comments are brief and restate arguments that it and other LECs have already made. Ameritech's submission also contains a lengthy appendix entitled "Competition for High Capacity Service in the Ameritech Region." The appendix contains four main sections: a competitive assessment, a description of high capacity service, a list of alternative local transport systems providers, and finally a section on competitive impact in the Ameritech region.

54. In discussing alternative service providers, Ameritech cites a report which states that the BOCs currently have a market share of approximately 80 percent "'[o]f all fiber utilization within the top 30 markets.'" Ameritech Comments, filed Feb. 10, 1989, App. A. By 1992, however, the report estimates, "'fiber's share of the dedicated circuit market will grow to approximately 35% of revenues, with the BOC and alternative metropolitan fiber optic network providers sharing equally in the revenue.'"[44]

55. Ameritech's filing also contains extensive discussion of various current and potential competitors, including newspaper clippings and advertisements detailing the activities of these companies. Ameritech asserts that customers are increasingly moving to facilities bypass options. According to Ameritech, an analysis of current billed access revenues highlights the potential impact of alternative service providers. Ameritech represents that anywhere from less than 10 percent to almost 40 percent of its access revenues are potentially vulnerable to fiber based competitors and that microwave systems expand the potential competitive loss. Ameritech notes that metropolitan areas where traffic is most densely concentrated provide opportunities for competitive entry. According to Ameritech, "almost 20 percent of current access revenue is billed to customers in serving wire centers where fiber based [alternative service providers] have stated business intentions." *Id.* at Competitive Impact, p. 3. Ameritech

states that this potentially represents $400 million in revenue to Ameritech. In estimating actual competitive loss, however, Ameritech lists 15 cases in which it states that it has lost DS3 service opportunities to competitors. For its five operating companies, Ameritech estimates that these 15 cases represent a loss of 29-30 DS3 circuits with annual revenues of $2.5 to $2.6 million. *Id.* at DS3 Competitive Loss.

D. *Dry Fiber Issues*

1. Supplemental Direct Cases

56. Only four LECs -- BellSouth, Bell Atlantic, Southwestern, and US West -- filed supplemental direct cases in response to the Bureau's designation order concerning the provision of dry fiber. These direct cases were all filed on November 1, 1988. All of these carriers make arguments with respect to the provision of dry fiber that are similar to the assertions made in their other pleadings in this investigation. For example, Bell Atlantic contends: (1) that the costs of individual dry fiber installations vary significantly; (2) that demand is insufficient to support averaged rates for DS3; and (3) that competition in the provision of dry fiber facilities necessitates the use of ICB rates. Bell Atlantic Dry Fiber Direct Case, App., at 1. Bell Atlantic argues that dry fiber and DS3 service are not like, however, because customers have total control over the transmission characteristics of the fiber and can configure it as they choose. Bell Atlantic concludes that because the telephone company does not provide the electronics, the dry fiber facilities it provides do not constitute a communications facility and should therefore be detariffed. BellSouth and US West agree that cost variations and the limited demand for dry fiber, as well as the existence of competition, justify ICB pricing for dry fiber facilities. BellSouth Dry Fiber Direct Case at 8-9;[45] US West Dry Fiber Direct Case at 3-5.[46]

57. Southwestern, on the other hand, argues that dry fiber "is merely a form of DS3 service without electronics, repeaters and multiplexers." Southwestern Dry Fiber Direct Case at 1. Southwestern believes that dry fiber facilities should therefore be priced on an individual case basis for all the reasons that it has argued that ICB pricing of DS3 service is appropriate. *Id.* at 4-9.

2. Comments and Oppositions

58. Seven parties filed responsive pleadings on November 14, 1988. Included among them were two LECs -- GTOC and NYNEX -- that did not file direct cases on the dry fiber issues because they did not provide dry fiber facilities. These two LECs and EDS support the continued use of ICB pricing, if tariffing is to be required, and generally advance the same arguments they use to support ICB pricing for DS3 service. EDS Dry Fiber Comments at 5-8; GTOC Dry Fiber Comments at 7-10; NYNEX Dry Fiber Comments at 4. GTOC emphatically disagrees with Southwestern's position that dry fiber is merely a type of DS3 service. GTOC Dry Fiber Comments at 7. Rather, GTOC contends, dry fiber does not constitute wire communications and is not a common carrier service. Therefore, GTOC concludes, dry fiber facilities are not subject to this Commission's jurisdiction under Title II of the Communications Act and should be detariffed. *Id* .at 4-5; *see also* NYNEX Dry Fiber Comments at 4.

59. The remaining commenters, the Association of Local Telecommunications Services (ALTS), Locate, MFS, and US Sprint, oppose ICB pricing for dry fiber facilities. Locate states generally that ICB pricing should not be permitted unless LECs can make a compelling showing that averaged, tariffed rates are not practicable. Locate Dry Fiber Opposition at 2. Locate agrees with Southwestern's position that dry fiber is merely a type of DS3 service. Locate argues that cost and technical differences do not justify ICB pricing for dry fiber. Locate Dry Fiber Opposition at 4-8. MFS argues that LECs could use ICB pricing for dry fiber to package dry fiber with deregulated customer premises equipment (CPE) to avoid their tariffed rates and provide special deals for favored customers. MFS Dry Fiber Opposition at 4. These parties also reject Bell Atlantic's assertion that dry fiber is not a communications service. *See* Locate Dry Fiber Opposition at 3.[47] Finally, ALTS argues that additional information is needed to determine, *inter alia*, whether the provision of dry fiber comports with the Modification of Final Judgment.[48] ALTS expresses concern that LECs could use ICB pricing to engage in cross-subsidization of unregulated CPE ventures. ALTS Dry Fiber Opposition at 2-3.

3. Rebuttals

60. Only three LECs filed rebuttals on November 21, 1988. BellSouth contends that there are distinctions among dry fiber arrangements and between dry fiber and DS3 service. BellSouth asserts that dry fiber does not represent unbundling of DS3 components nor does it represent a different packaging of the same components. BellSouth concludes that averaging is not appropriate for services that must be custom-designed and engineered. BellSouth Dry Fiber Rebuttal at 4-8. BellSouth also contends that no party has demonstrated that its use of ICB rates is unreasonable. *Id.* at 8-12.

61. Southwestern reiterates its contention that it faces extensive competition in the market for DS3 service and dry fiber. Southwestern Dry Fiber Rebuttal at 4-7. Southwestern also argues that it has demonstrated that its ICB pricing of dry fiber services is not unreasonably discriminatory. *Id.* at 7-12. US West emphasizes that the LECs lack sufficient experience to file averaged rates for dry fiber. US West Dry Fiber Rebuttal at 6-8.

IV. DISCUSSION

62. For the reasons stated below, we conclude that, with few exceptions, the ICB rates for DS3 and DS3-equivalent services designated for investigation in this docket are unreasonably discriminatory. We therefore direct the affected LECs to file tariff revisions as discussed below to convert all ICB rates for DS3 and DS3-equivalent services to nondiscriminatory, generally available rates, except in certain limited circumstances.

A. *Lawfulness of ICB Pricing*

63. The term "individual case basis" or "ICB" pricing is usually used when a carrier adopts a practice of developing a price for a particular service or facility in response to each customer request for the service or facility. This practice represents a departure from the normal practice in the telecommunications industry. Even if carriers establish multiple pricing options for a particular service,

the options are usually described in a tariff that is generally available to anyone who elects to take a particular option.

64. This Commission discussed ICB pricing of access services in the *ECA Tariff Order*. We noted that rates for some service elements were not specified in the tariffs and that the National Exchange Carrier Association (NECA) said these rates would be developed on an individual case basis. We said:

> Because the ICB rates apply primarily to service elements not previously offered by telcos, we recognize that it will take some time for them to develop rates for certain facilities offered under these elements. For this reason, we are allowing the ECA to use the ICB approach in this filing. However, as the telcos develop rates or generally applicable regulations for these facilities we expect those rates and regulations to be set forth in the ECA access tariff.

97 FCC 2d at 1143.

65. The Bureau initiated this investigation because the Bureau concluded that continued ICB pricing of DS3 facilities did not appear to be consistent with this Commission's expectations. When the Bureau initiated this investigation, the exchange carriers had been providing DS3 facilities for some time and with increasing frequency but had not indicated that they had developed any plans to establish general rates, terms, or conditions for such offerings. Although most exchange carriers have now established some kind of general offering, the question of the lawfulness of ICB pricing *per se* is not entirely moot. A few carriers still provide DS3 facilities exclusively as ICB offerings and other carriers that have never provided a DS3 on any basis are likely to do so.

66. Our expressed expectation that carriers would replace ICB pricing with generally applicable rates and regulations was, of course, based upon our understanding of the obligations that Section 202(a) of the Communications Act imposes upon carriers. Although the Act does not expressly require general offerings, the Act does require the carriers to establish charges that do not result in "unreasonable" discrimination among customers of "like" telecommunications services. This obligation is normally interpreted as requiring that carrier offerings be generally available to all similarly situated customers. *See Sea - Land Services, Inc. v. ICC*, 738 F.2d 1311, 1317 (D.C.Cir. 1984); *AT & T Communications*, 4 FCC Rcd 4932, 4938 (1989) (*Tariff 12 Order), recon. denied*, 4 FCC Rcd 7928 (1989). It might theoretically be possible to devise a scheme for developing individual rates for each facility that does not produce discrimination, but it would be extremely difficult to establish a scheme that would produce individual facility rates that are rationally related to each other in some manner that is fair, just, and reasonable. The record in this proceeding does not demonstrate that any of the LECs who used ICB pricing for DS3 services achieved such a result.

67. We accordingly will presume that ICB pricing of DS3 service is discriminatory. We do not, however, conclude that a carrier can necessarily be expected to develop a general rate for a facility that it has never provided in the past even if the carrier has reason to expect that it will receive some future requests for a like service. The use of ICB pricing as an interim transitional measure is thus not necessarily unlawful because Section 202(a) of the Act merely prohibits unreasonable discrimination. We conclude that discrimination that results from ICB pricing of a very limited number of DS3s as a transitional mechanism is not unreasonable.

68. It is not possible for us, at this time, to state with mathematical precision the level of demand that would necessitate the filing of general rates for DS3 service. Based on the record before us, however, we conclude that Nevada Bell and all of the independent telephone companies except for GTOC, SNET, and Cincinnati have insufficient experience with DS3 service to justify a requirement that they file averaged rates at this time. For example, we believe that the record supports a finding that United and Nevada have insufficient demand to warrant requiring them to file general rates at this time. We caution that, even for these carriers, the use of ICB rates for DS3 service is not justified in perpetuity. Moreover, the mere fact that a carrier is an independent telephone company is not dispositive of the reasonableness of its ICB rates. We view the use of ICB rates for DS3 service as an appropriate transitional mechanism to be used until the LEC has sufficient experience to develop general rates. Carriers that continue to file ICB rates for DS3 service must justify the use of such rates. In general, we believe that, once exchange carriers have sufficient experience with a service such as the provision of DS3 facilities to permit the development of averaged rates, they must file such rates.

B. *Grandfathering Existing ICB DS3 Rates*

69. We also conclude that the BOC and GTOC grandfathered ICB rates subject to our investigation in CC Docket Nos. 88-136 and 89-305 are unreasonably discriminatory. It is important to note that our decision to allow the LECs to use ICB rates was conditioned on the eventual development of averaged rate schedules and the elimination of ICB rates. This Commission accepted ICB rates for certain services that telephone companies had not previously offered in the initial access tariffs, but cautioned that we expected rates and regulations for such services to be described in the relevant tariff as they were developed.[49] More than five years have elapsed since this Commission said that we expected exchange carriers to file general rates for access services. Although it is true that we did not specify a date certain by which the carriers would be required to comply, we did not anticipate that it would take five years for even the largest LECs to begin to file generally available rates for DS3 service.

70. The LECs' arguments that grandfathered ICB rates are not unreasonably discriminatory are unpersuasive. First, they provide no convincing support for their assertion that grandfathered ICB customers and customers who order service pursuant to averaged tariffs are not similarly situated. Ameritech's only proffered distinction between the two groups of customers is the obvious fact that one group of customers ordered service before Ameritech's general tariff became effective while the other group of customers ordered service after that time.[50] The fact that customers commenced service at different times in the past does not justify charging them different rates for equivalent services in the future. If that distinction were sufficient to demonstrate that customers receiving functionally identical services are not similarly situated then it

is difficult to imagine any circumstances under which disparate rates could be found unreasonably discriminatory. NYNEX argues that these two groups of customers are not similarly situated because the grandfathered ICB customers selected the fixed ICB contract under which they are provided DS3 service. This argument is equally unavailing. Grandfathered ICB customers did not have the option, when they ordered service, to take service under the generally tariffed rates, nor do new DS3 customers have the option of electing ICB rates.[51] We are not examining the lawfulness of multiple general offerings in this proceeding. The grandfathered rate provisions in these tariffs present a different question.

71. The LECs' arguments certainly do not establish that the services provided under the ICB arrangements and the services provided under their general tariffs are not "like" services as that term is used in Section 202(a) of the Communications Act, 47 U.S.C. § 202(a). It is well-established that the "functional equivalency" test is an appropriate method of determining likeness. This test focuses on whether the services in question are different in any material respect. . . . The test looks to the nature of the services offered to determine likeness; the perspective of the customer faced with differing services is often considered a significant factor. *American Broadcasting Cos. v. FCC*, 663 F.2d 133, 138-39 (D.C.Cir. 1980) (*ABC*)). *See also Ad Hoc Telecommunications Users Com. v. FCC*, 680 F.2d 790, 795 (D.C.Cir. 1982). The LECs do not suggest that there are any material differences in the functionalities provided by these two classes of facilities.[52] Nor do they demonstrate that the customers perceive ICB DS3 service to be different than DS3 service ordered under general tariff rates. As the Court noted in upholding this Commission's finding of likeness in *ABC*, "[c]ustomers apparently view the two services as the same, making their decisions about service solely on the basis of price." 663 F.2d at 139. To the extent customers have had any opportunity to decide whether to be billed under the general tariff or under an ICB arrangement, as NYNEX states its customers have, we have no reason to believe that any factor other than price drove that decision.[53]

72. Grandfathered ICB DS3 services and DS3 services provided under the LECs' general tariffs are thus clearly like services that are provided at disparate rates. The LECs generally assert that both sets of rates were developed on the basis of costs and that any discrimination is therefore not unreasonable. At the same time, however, the LECs concede that factors other than costs were considered in the ICB rate development process. Southwestern's description of its ICB ratemaking methodology perhaps best summarizes the LECs' ICB philosophy. According to Southwestern, "absent competitive necessity or costs that exceed rates, [Southwestern] charged the same rate to DS3 customers under like conditions." Southwestern appears to believe that simply demonstrating that discrimination is not irrational (inasmuch as the carrier can provide some explanation for the discrimination) is sufficient to demonstrate that it is not unreasonable.

73. Even if the ICB rates accurately reflected the costs of each DS3 that was provided on an individual cost basis, the simultaneous use of averaged cost rates for some facilities and individual cost rates for other facilities would result in unreasonable discrimination. Demonstrating that rate differences reflect cost differences in providing two or more groups of services does not automatically establish that the rate differentials are lawful. A carrier must demonstrate that it had a rational and valid reason for assigning facilities or customers to those groups. It is not self-evident that facilities ordered before or after April 1, 1989, or any other particular date should be assigned to different categories for purposes of computing a cost-based rate.

74. Moreover, although the LECs frequently invoke "competitive necessity" as a justification for ICB pricing, none of the carriers has made a showing of competitive necessity that meets this Commission's requirements. In the *Private Line Guidelines Order* [54] we stated that

> [a] carrier's proof [of competitive necessity] should include a showing that (1) an equal or lower priced competitive alternative -- a similar offering or set of offerings from other common carriers or customer-owned systems -- is generally available to customers of the discounted offering; (2) the terms of the discounted offering are reasonably designed to meet competition without undue discrimination; and (3) the volume discount contributes to reasonable rates and efficient services for all users. We will assess the adequacy of the competitive-necessity justification on a case-by-case basis until we are able to develop additional standards in this area.

97 FCC 2d at 948.

75. The LECs have made generalized assertions that competition for the provision of DS3 service exists, and have conceded that this has been a factor in the development of at least some of their ICB rates. However, these LECs have not made any showing that would meet the test outlined above. Indeed, the LECs' discussion of competition, both in their various direct and rebuttal cases, and in their comments in response to the *NCI Public Notice*, is essentially anecdotal. Ameritech has made the most extensive showing as to the extent of competition, and its pleading relies mainly on speculation as to the potential revenues that might be vulnerable to competition at some future date. Although Ameritech cautions that its assessment of competitive loss is not necessarily complete, the fact that it has identified only $2.6 million in competitive losses in 1988 is perhaps revealing of the extent of competition.[55]

76. At most, the LECs have demonstrated that competitive conditions may justify some departures from a single general offering of DS3 facilities. We do not intend to determine the precise limits of future DS3 pricing flexibility in this proceeding. We are merely endeavoring to determine whether current ICB pricing practices are consistent with relevant statutory requirements. None of the LECs has demonstrated a relationship between competitive conditions in DS3 markets and the broad grandfathering exemptions in the current tariffs that could arguably satisfy the competitive necessity test.

77. Finally, LEC claims that equitable factors justify grandfathering do not persuade us that these particular grandfathering exemptions should remain in effect indefinitely. Although we have concluded that ICB pricing of DS3 facilities was reasonable as an interim transitional measure, it does not follow that long-term ICB contracts were ever reasonable. The LECs should have refrained from making commitments that might interfere with their ability to substitute general averaged rates for DS3 facilities as soon as the LECs acquired the necessary informa-

tion to compute such rates. Although the LECs in fact made such improvident commitments, we do not believe the DS3 customers had a reasonable expectation that they would retain all the benefits of such bargains. Residential customers and small shopkeepers do not use DS3 service. Rather, the ICB arrangements that are subject to this investigation cover DS3 facilities that are being provided to interexchange carriers and a limited number of large business users. These highly sophisticated customers are well aware of the provisions of Section 202(a) of the Act, would have known that DS3 technology would not remain on the cutting edge of technology, and almost certainly knew (or should have known) that this Commission had declared as early as February 1984 that ICB pricing of new services or facilities is not acceptable as a long-term measure. Therefore, neither the exchange carriers nor their customers had a right to expect that an ICB rate would remain in effect for a long period of time.

78. Conversion from ICB to general arrangements could, however, create inequitable results in some circumstances that would not be consistent with the purposes of Section 202(a) of the Act. Differences in initial nonrecurring charges, termination provisions, and other terms and conditions require complex adjustments to ensure that any converted ICB customers do not receive significantly different treatment from customers who order new facilities under the general tariffs. We are accordingly establishing a timetable to facilitate this transition.

79. Within 30 days of the release of this Order, the affected LECs shall file tariff revisions, to be effective on 45 days' notice, that amend the terms of all currently effective fixed-term ICB contracts for DS3 and DS3-equivalent service to terminate one year from the effective date of the tariff revisions. ICB arrangements that would terminate before this date, however, shall not be affected by these tariff revisions but will terminate as scheduled.[56] In addition, any open-ended or month-to-month ICB arrangements that have not yet been converted to general rates must be converted to general rates immediately. We direct any LEC that is currently providing DS3 or DS3-equivalent service under such an arrangement to file tariff revisions within 30 days of the release date of this Order, to be effective on 14 days' notice, to convert these open arrangements to general rates. These conversions shall be effective on the effective date of the tariff revisions. In addition, in order to fairly recognize the fact that some ICB customers have made substantial "up-front" payments, we direct the LECs to tariff a credit mechanism that will reflect such payments.[57] In this way, any customer that has, in effect, "bought-down" its monthly rate will be protected against being overcharged under the general rates.[58] Finally, we will not permit LECs to assess converted ICB customers termination liability charges or non-recurring charges.

80. These conclusions apply equally to the grandfathered ICB rates filed by GTOC, SNET, and Cincinnati.[59] These carriers have all filed general tariffs that are subject to investigation in a separate proceeding. We have reviewed the record in CC Docket No. 89-305 on this issue and find that GTOC, like the BOCs, has not been able to demonstrate that retaining ICB rates for existing DS3 customers after the effective date of its general DS3 tariff is reasonable. We therefore direct GTOC, SNET, and Cincinnati to convert their grandfathered ICB arrangements to their currently-effective general tariff rates.[60] As we indicated in our discussion in para. 68, *supra*, we believe that the other independent telephone companies subject to this investigation and Nevada Bell have demonstrated that they have insufficient experience with DS3 service to justify requiring them to file general rates at the present time.

C. *Use of ICB Rates for Individual Rate Elements and Particular Types of DS3 Circuits*

81. We also direct the LECs to file averaged rates for their remaining cases of ICB pricing. In order to assure that rates and charges for DS3 service are not unreasonably discriminatory it is especially important that the LECs' tariffs not contain ICB pricing for one rate element of each DS3 circuit. It is obvious that unreasonable discrimination is reduced very little, if at all, if carriers continue to price the largest portion of a circuit -- the channel termination or Local Distribution Channel (LDC) -- on an individual case basis.

82. The LECs' arguments for retaining ICB pricing for individual rate elements are particularly unpersuasive. First, the LECs argue that the costs of serving each customer vary widely. There may be some truth to this, especially if, as Ameritech has sought to do, the LEC dissects the circuit and directly assigns the costs of individual facilities to specific customers. This Commission's Rules do not require carriers to engage in such exhaustive cost allocations in order to set rates, nor do the LECs generally do so. As Ameritech admits, the cost differences that can thus be shown to exist between particular customers are hardly unique to DS3 service. Indeed, it seems likely that such distinctions could be found in any service. Nevertheless, such cost differences as might in this manner be shown to exist would not provide sufficient reason for charging similarly situated customers disparate rates for like services. Thus, there seems little reason to distinguish DS3 service from others and grant carriers the discretion to charge unreasonably discriminatory rates for like services.

83. Ameritech also contends that its DS3 demand universe is either not large enough or not stable enough to support averaged rates. Although we recognize that each region and each Bell Operating Company has its own unique circumstances, the fact that five BOCs have been able to develop averaged rates for channel terminations supports a conclusion that the remaining BOCs, Ameritech and Pacific, should also be capable of developing such rates. Ameritech fails to state specific circumstances that distinguish it from the other BOCs.

84. Ameritech further expresses the concern that averaged rates for DS3 LDCs will hamper its ability to compete. We do not believe that the obligation to charge non-discriminatory averaged rates will impose a significant handicap on the LECs. As we have already noted, the LECs have not shown that alternative service providers have made significant inroads to date.[61] Our decision to prohibit ICB pricing does not foreclose Ameritech from developing more than one generally available DS3 option. Moreover, our decision in this investigation does not foreclose all future changes in DS3 rate structures. We merely find that, on the basis of the facts in this record, certain existing DS3 pricing practices are unlawful.[62] We therefore direct the LECs to remove the offending provisions and file general rates for all DS3 rate elements.[63]

85. Similarly, although the cost and demand characteristics for certain categories of DS3 service (orders for more than a certain number of circuits, orders for circuits of a certain length, *etc.*) may, indeed, be different than the typical service configuration, we do not believe that the LECs have demonstrated that these costs are not susceptible to averaging. Of course, the LECs are not required to have distinct rates for orders of more than a certain number of DS3s or for circuits of more than 20 miles.[64] Indeed, if, as NYNEX and Southwestern claim, these orders represent only a small fraction of total demand for DS3 service, averaging the costs of these "unique" service configurations with the costs of more typical service configurations should help to reduce the cost disparities.

86. Moreover, the argument that these types of circuits are unique is subject to abuse. If a LEC wanted to provide a special deal for a favored customer, it is not difficult to conceive of some "unique" type of DS3 service being introduced at an ICB rate.[65] To the extent that particular types of circuits do, in fact, possess unique characteristics, carriers have the option of tariffing additional charges to account for these peculiarities.

87. Finally, we cannot agree with the LECs' assertions regarding the purpose of uniform, averaged rates. Several LECs assert that the only concerns that averaged ratemaking is intended to address are this Commission's paramount objective of promoting universal service and the related goal of protecting the interests of rural and poor ratepayers. The statements that these parties cite, however, pertain to maintaining geographically averaged toll rates. That is not the sole purpose of general offerings. General offerings also provide a convenient source of unambiguous rate information for customers. In addition, generally available rates are less likely to be unreasonably discriminatory than ICB rates. The LECs have not demonstrated that they can administer ICB pricing of DS3 services in a manner that does not produce unreasonable discrimination in charges for like services. Finally, averaged rates for DS3 service obviate the necessity for this Commission to review a continuing flood of ICB filings and will thus conserve our limited resources.

D. *Dry Fiber Issues*

88. We will not, however, require the LECs to file general rates for dry fiber at this time. We note that the provision of dry fiber facilities is very new and has limited applicability. At present, it thus appears the the LECs lack sufficient experience to file averaged rates, and we accordingly will at this time permit them to file ICB tariffs until they have a track record with dry fiber offerings. The analysis also is complicated by the fact that, unlike DS3 service, the customer apparently retains total control over the electronics to be used and thus over the transmission characteristics of any service ultimately provided over the fiber. Moreover, the record raises the question whether the provision of dry fiber cable should be construed as a communications service subject to our jurisdiction under Title II of the Communications Act. That question was not squarely presented in this investigation, however, and we will therefore not attempt to resolve it here.

V. ORDERING CLAUSES

89. Accordingly, IT IS ORDERED, that the individual case basis rates for DS3 and DS3-equivalent services designated for investigation in these dockets are found to be unreasonably discriminatory and are therefore UNLAWFUL.[66] The local exchange carriers specified herein are ordered to convert all existing individual case basis rates for DS3 and DS3-equivalent services designated for investigation in this docket to nondiscriminatory, generally available rates. Such conversions shall be made in accordance with the requirements established in paras. 79-80, *supra*, and the accompanying footnotes.

90. IT IS FURTHER ORDERED that the local exchange carriers specified herein SHALL FILE tariff revisions in compliance with this Order not later than 30 days after the release date of this Order to be effective as specified herein.

91. IT IS FURTHER ORDERED that the accounting Orders established in CC Docket No. 88-136 ARE TERMINATED to the extent indicated herein.

92. IT IS FURTHER ORDERED that the investigation of local exchange carriers' individual case basis DS3 service offerings in CC Docket No. 88-136 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] DS3 service is a high-capacity special access service that provides capacity equivalent to 28 DS1 circuits or 672 voice-grade special access circuits.

[2] *See* paras. 67-68, *infra*.

[3] GTOC's ICB DS3 rates were made subject to the investigation in CC Docket No. 88-136 as they became effective. GTOC subsequently filed a general DS3 tariff which was designated for investigation in CC Docket No. 89-305. *See* GTE Telephone Operating Companies, CC Docket No. 89-305, 4 FCC Rcd 5425 (Com.Car.Bur. 1989) (*GTOC Designation Order*).

[4] Bell Atlantic Telephone Companies, 3 FCC Rcd 1621 (Com.Car.Bur. 1988) (*March 8 Order*), *recon. denied*, 4 FCC Rcd 2381 (Com.Car.Bur. 1988). The Bureau found that "Bell Atlantic has not been able to indicate that there is any reasonable basis on which it set its proposed ICB rates and the record does not suggest that there is any lawful justification for what can only be described as striking disparities between the ICB rates it charges different customers." *March 8 Order*, 3 FCC Rcd at 1622.

[5] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, Order Designating Issues for Investigation, 3 FCC Rcd 2582 (Com.Car.Bur. 1988) (*Designation Order*).

[6] *Designation Order*, 3 FCC Rcd at 2582.

[7] Supplemental Order Designating Issues for Investigation, CC Docket No. 88-136, 3 FCC Rcd 6066 (Com.Car.Bur. 1988) (*Supplemental Designation Order*). Dry fiber is unpowered cable. The provision of dry fiber cable does not involve supplying the electronics which will eventually power the cable.

[8] *Supplemental Designation Order*, 3 FCC Rcd at 6066.

[9] Public Notice, Network Communications, Inc., Files Comments on Individual Case Basis Rates for DS3 Services, CC Docket No. 88-136, 4 FCC Rcd 846 (1989) (*NCI Public Notice*).

[10] The five regional BOCs that filed general DS3 tariffs in the context of the annual filing are Bell Atlantic, BellSouth Corporation (BellSouth), New York Telephone Company and New England Telephone Company (NYNEX), Pacific Bell (Pacific), and Southwestern Bell Telephone Company (Southwestern).

[11] *See* Annual 1989 Access Tariff Filings, 4 FCC Rcd 3638, 3696-97 (Com.Car.Bur. 1989), *recon. & app. for review pending*.

[12] Ameritech Operating Companies, 4 FCC Rcd 3945 (Com.Car.Bur. 1989) (*Ameritech DS3 Order*); Second Supplemental Order Designating Issues for Investigation, 4 FCC Rcd 4470 (Com.Car.Bur. 1989) (including US West general DS3 tariff in investigation).

[13] *1989 Access Tariff Order* 4 FCC Rcd at 3638.

[14] For example, Pacific has introduced tariffed rates for DS3 channel mileage but continues to provide DS3 channel terminations on an individual case basis. *See 1989 Access Tariff Order*, 4 FCC Rcd at 3695. Ameritech also offers tariffed rates for DS3 channel mileage and DS3 to DS1 multiplexing but continues to rate DS3 Local Distribution Channels (LDCs) (Ameritech's term for channel terminations) on an individual case basis. *See Ameritech DS3 Order*, 4 FCC Rcd at 3945. In addition, although Southwestern has implemented general rates for DS3 service, it does not distinguish in its rates between channel terminations and channel mileage. Moreover, Southwestern will charge ICB rates for orders of more than 15 DS3 circuits, for DS3 circuits requiring channel mileage in excess of 20 miles, for unprotected DS3 circuits, and for DS3 circuits to an exchange access boundary. *1989 Access Tariff Order*, 4 FCC Rcd at 3694.

[15] Protected DS3 circuits provide an alternative transmission path in the event service on the primary channel or channels is interrupted.

[16] *Second Supplemental Designation Order*, 4 FCC Rcd at 4471.

[17] *GTOC Designation Order*, 4 FCC Rcd at 5426.

[18] *Id.*

[19] Our summary of the pleadings on this issue includes both the pleadings filed in CC Docket No. 88-136 and the pleadings filed in CC Docket No. 89-305 as they relate to the first issue designated in the *GTOC Designation Order*.

[20] Several carriers note in particular that some ICB customers have paid substantial "up-front" charges and that converting these customers to general tariff rates would create a hardship. *See* Bell Atlantic Supplemental Direct Case at 6. In contrast, US West believes that converting month-to-month DS3 customers, as opposed to customers that selected longer minimum service terms, immediately to general rates is both fair and consistent with the expectations of both parties. US West Supplemental Direct Case at 12.

[21] Ameritech asserts that virtually all grandfathered arrangements would be terminated no later than May 2, 1994. *Id.* at 5.

[22] *See, e.g.*, Ameritech Supplemental Direct Case at 5-6 (citing Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, 102 FCC 2d 1007, 1027 (1985)); Bell Atlantic Supplemental Direct Case at 1-2 (the resulting temporary rate disparities reflect "'a reasonable accommodation of the interests of all interested parties.'" *Id.* at 3, quoting WATS-Related and Other Amendments to Part 69 of the Commission's Rules, 2 FCC Rcd 245 (1987)).

[23] NYNEX states that in order to ameliorate any potential for undue discrimination, it allowed ICB customers to convert their serving arrangement to general tariff rates. Thus, NYNEX concludes, grandfathering existing ICB rates does not discriminate against ICB customers. NYNEX Supplemental Direct Case at 7 & n.19.

[24] American Telephone and Telegraph Company (AT&T) and Electronic Data Systems Corporation (EDS) filed comments on the supplemental direct cases. MCI Telecommunications Corporation (MCI), Metropolitan Fiber Systems, Inc. (MFS), and Local Area Telecommunications, Inc. (Locate), Teleport Communications Group, Inc. (TCG) and Communications Transmission, Inc. (CTI) filed oppositions.

[25] AT&T notes that non-recurring charges should not be applied in cases in which service is simply converted from ICB rates to general rates because the LEC would not incur the nonrecurring costs that these charges are designed to recover. AT&T Supplemental Comments at 4 n.*. AT&T also observes that the dire consequences it envisions could be averted if this Commission adopts a credit mechanism for such cases. *Id.* at 5 n.*.

[26] MCI argues that while some customers might experience rate increases, this is reasonable because these customers had not been paying their fair share under ICB rates. MCI Supplemental Opposition at 12-13.

[27] TCG also argues that the *Sierra-Mobile* doctrine, cited by the LECs, is inapplicable in this situation because this proceeding does not involve a carrier's unilateral abrogation of a contract by filing a tariff. *Id.* at 6 n.10.

[28] AT&T and US Sprint filed comments on GTOC's direct case. MCI filed an opposition and Intermedia and Locate filed a joint opposition to the direct case.

[29] Indeed, Intermedia and Locate append to their opposition previous pleadings that they filed on this issue.

[30] MCI also argues that GTOC's general DS3 rates have increased substantially and unjustifiably in comparison with its ICB rates. MCI urges us to require GTOC to include in revised rate calculations the demand effects of converted ICB arrangements. MCI Opposition at 10-11.

[31] Bell Atlantic notes that the Bureau's rejection of two of its ICB filings was due to Bell Atlantic's failure to demonstrate that the particular rates in question were not unreasonably discriminatory. Bell Atlantic Rebuttal at 3.

[32] BellSouth does not explain why it would have to change the technical specifications.

[33] Southwestern also argues that, if it must always charge customers that order service at different times the same rate (as, for example, if it must convert ICB customers to general rates) then it would never be able to change the rates for a long-term service offering. Southwestern Rebuttal at 4-5.

[34] Pacific also argues that the factors that hindered the development of averaged DS3 rates affect rates for channel terminations (what Ameritech calls LDCs) in particular. Pacific Supplemental Direct Case at 4-6. *See also* GTOC Supplemental Direct Case at 7.

[35] Southwestern's tariff retains ICB pricing for orders of more than 15 DS3s, for DS3 circuits longer than 20 miles, and for non-protected DS3s. Southwestern states that, between 1985 and 1989, these cases accounted for approximately 4 percent, 11 percent, and 3 percent of its overall DS3 demand. Southwestern Supplemental Direct Case at 11-13.

[36] Pacific also notes that Nevada Bell has only one DS3 customer and that Nevada should therefore be permitted to retain ICB pricing until a sufficient customer base is developed for averaged rates. Pacific Rebuttal at 5-7. In a similar vein,

United notes EDS's support for its position that its demand universe is too small to support averaged rates. United Rebuttal at 2.

[37] In support of its position Ameritech cites the discussion of geographic averaging of toll rates contained in this Commission's *Price Cap Order*. Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, 4 FCC Rcd 2873, 3130-32 (1989).

[38] Ameritech notes that this Commission retains jurisdiction over all interstate carriers. Ameritech Rebuttal at 18 (*citing* Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, CC Docket No. 79-252, *Second Report and Order*, 91 FCC 2d 59, 69 (1982); MCI Telecommunications Corp. v. FCC, 765 F. 2d 1186 (D.C. Cir. 1985)).

[39] Parties expressing this view include Diginet, Inc., Eastern TeleLogic Corp. (ETC), Intermedia Communications of Florida, Inc. (Intermedia), Locate, MFS, and TCG.

[40] Intermedia states that it is the only competitive service provider in Florida. Intermedia Comments at 7.

[41] TCG also agrees with NCI's contention that ICs and non-carrier customers of the LECs that build their own communications systems are not competing with the LECs because they are not attempting to secure the business of a third party. TCG Comments at 8.

[42] Ameritech, NYNEX, Southwestern, and US West filed comments in response to the *NCI Public Notice*.

[43] In particular, NYNEX estimates Locate's New York customer base as of the end of 1988 at nearly 600 DS1 equivalents. NYNEX Comments at 4.

[44] *Id.* (quoting TeleStrategies, "Metropolitan Fiber Optics Network Market Report, 1987-1991," p. 6-3).

[45] BellSouth notes that it has only three customers for dry fiber facilities and that it provides only six dry fiber arrangements in three states. BellSouth Dry Fiber Direct Case at 8-9.

[46] US West states that dry fiber cable facilities and DS3 service are "distinctly different" in that one is an unfinished facility and the other is a finished telecommunications service. US West Dry Fiber Direct Case at 3.

[47] Locate notes that Section 3(a) of the Act defines "wire communication" as "including all instrumentalities, facilities, apparatus and services. . . incidental to . . . transmission." 47 U.S.C. § 153(a).

[48] United States v. American Tel. & Tel. Co., 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

[49] *See* ECA Tariff Order, 97 FCC 2d 1082, 1143 (1984).

[50] GTOC makes much the same argument in its direct case in CC Docket No. 89-305.

[51] NYNEX has since permitted ICB customers the option of converting to general tariff rates. NYNEX asserts that only seven customers in New York and three in New England elected to remain as ICB customers. NYNEX further states that these contracts represent "about" 64 DS3 circuits with annual revenue of $3.6 million in New York and $744,000 in New England. NYNEX Supplemental Direct Case at 8 n.19.

[52] GTOC does assert that there have been changes in the technology used to provision DS3 service and in the applications for which the service is used. GTOC does not explain this contention, however. In any event, GTOC offers this assertion not to prove that ICB customers and general rate customers are not similarly situated, but to suggest that there are policy reasons that support grandfathering regardless of whether the services are like. *See* GTOC Direct Case in CC Docket No. 89-305 at 4.

[53] Indeed, it is clear that the only distinction in the case of NYNEX's customers is price. NYNEX does not state that it has rearranged the service provided to ICB customers that convert to the general tariff rates. Rather, these customers have simply been given the option of converting to a different rate structure.

[54] Private Line Rate Structure and Volume Discount Practices, CC Docket No. 79-246, 97 FCC 2d 923 (1984) (*Private Line Guidelines Order*).

[55] It is worth noting that, although Ameritech identifies at most $2.6 million in competitive loss, it asserts that $400 million in revenues is potentially vulnerable. Ameritech's losses may thus amount to 0.6 percent of the allegedly vulnerable revenues. The share of the overall market that Ameritech's "lost" revenues would represent would be considerably less, since the market would presumably include revenues from services that Ameritech does not assert to be vulnerable to competition.

[56] For example, if the tariff revisions we require to be filed become effective on February 1, 1990, then any ICB that is currently scheduled to terminate *after* February 1, 1991, shall be amended to terminate on February 1, 1991. Any ICB that is scheduled to terminate *on or before* February 1, 1991, shall terminate as currently scheduled. We emphasize that the record suggests that relatively few customers will be affected by this conversion. Indeed, the LECs have argued that the small number of grandfathered ICBs is a reason why we should permit these contracts to remain in effect. Moreover, although the LECs have not submitted information that would allow us to determine the scheduled termination dates of grandfathered ICB arrangements, it is reasonable to assume that a significant number of these arrangements will expire prior to the mandatory conversion date. This fact will further soften any adverse impact that conversion may have on grandfathered ICB customers.

[57] This credit should reflect the time-value of money paid by the customer.

[58] Some ICB customers have paid rates that are higher than the general tariff rates while others have paid rates that are lower than the general rates. We believe that the transition and credit mechanisms that we adopt in this Order should offer substantial protection to customers. Moreover, we believe that these transitional mechanisms, and the option that many ICB customers had of converting to the general tariffed rates, obviate the necessity for refunds to any customers that may have paid unreasonably high rates. We therefore terminate the accounting Orders that have been imposed in this docket except for those that apply to GTOC, SNET, and Cincinnati, whose general rates remain subject to investigation.

[59] SNET and Cincinnati have filed general tariffs for DS3 service which, like those of the BOCs and GTOC, seek to retain ICB pricing for existing DS3 customers. Individual case basis rates filed by SNET and Cincinnati have been made subject to this investigation as the rates became effective. *See* Southwestern Bell Tel. Co., CC Docket No. 88-136, 4 FCC Rcd 4528 (including, *inter alia*, Cincinnati ICB filing in investigation); Ameritech Operating Cos., CC Docket No. 88-136, 4 FCC Rcd 5141 (including, *inter alia*, SNET filing in investigation).

[60] We emphasize that our conclusions in this Order with respect to GTOC, SNET, and Cincinnati apply only to the issue of grandfathering. The remaining issues designated for investigation with respect to those three carriers will, of course, be decided solely on the basis of the record developed in those proceedings.

[61] We also note that a report released by the Common Carrier Bureau found that, as of the end of 1988, major long distance carriers had installed over 1.8 million miles of optical fiber and the RBOCs had deployed more than 1.5 million miles of fiber. In contrast, various "metropolitan fiber systems" had installed slightly over 12,000 fiber miles. *See* Kraushaar, Fiber Deployment Update, released Feb. 17, 1989.

[62] It is these LEC pricing practices, and not the pricing practices of non-dominant service providers, that are under investigation in this proceeding. We have confined our discussion here to the rates under investigation and therefore do not address Ameritech's argument that we must require non-dominant carriers to charge averaged rates.

[63] In addition to Ameritech and Pacific, which currently charge ICB rates for all DS3 LDCs, BellSouth retains ICB pricing for point-to-point DS3 channel terminations. We direct Ameritech and Pacific to file average rates for all their DS3 LDCs, and BellSouth to file averaged rates for its point-to-point DS3 channel terminations, when these carriers convert their existing ICB customers to general rates.

[64] These examples are merely illustrative of the types of ICB DS3 service configurations that must be converted to general rates and not exhaustive. We direct Southwestern, for example, to convert all of the services currently provided under Section 20.2.3(C) of its Access Service Tariff to general rates. The other LECs are also directed to convert remaining categories of ICB DS3 service to general rates.

[65] We note also that Southwestern's "unique" service configurations comprise, by its own reckoning, almost 20 percent of its total DS3 demand. Exceptions of this magnitude threaten to swallow the rule.

[66] This conclusion does not apply to rates for dry fiber service, the rates of independent telephone companies, (other than the grandfathered ICB rates of GTOC, SNET, and Cincinnati) or to rates that are subject to this Commission's investigation in CC Docket No. 89-305.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Alpha Lyracom, d/b/a PAN AMERICAN SATELLITE — File Nos. CSS-84-004-(M) CSS-84-004-(M-1)

For Modification of Authorization to Operate an International Fixed-Satellite System for Communication Between Specified Geographical Areas.

Alpha Lyracom, d/b/a PAN AMERICAN SATELLITE — File No. CSS-84-004-P(LA)

Final Authority to Operate an International Fixed-Satellite System for Communication Between Specified Geographical Areas.

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: December 11, 1989; Released: December 18, 1989

By the Chief, International Facilities Division:

1. By application File No. CSS-84-004-(M), filed on July 31, 1989, Pan American Satellite (PAS) requests modification of its authority to construct and operate an international fixed-satellite system[1] to enable it to use up to an additional seven 4/6 GHz, 36 MHz-equivalent transponders on its PAS-1 satellite for international communications purposes. PAS states that it originally intended to use these transponders, which are part of PAS-1's North Beam, for domestic services within Latin America and the Caribbean. However, customer demand requires use of the North Beam transponders for international services.

2. By application File No. CSS-84-004-(M-1), filed on August 29, 1989, PAS requests modification of its authorization to construct and operate an international fixed-satellite system[2] to enable it to use up to an additional five 4/6 GHz, 36 MHz-equivalent, transponders on its PAS-1 satellite for international communications purposes. PAS states that it originally intended to use these transponders, which are part of PAS-1's Central Beam, for domestic services within Latin America and the Caribbean. However, customer demand requires use of the Central Beam transponders for international services.

3. Applications File Nos. CSS-84-004-(M) and CSS-84-004-(M-1), respectively, were placed on public notice on August 12, 1989 and September 13, 1989. No comments pertaining to either application were received.

4. PAS states with respect to both the North Beam and Central Beam transponders that its requests for modification are conditional, subject to the completion of the INTELSAT Article XIV(d) consultation process with respect to specific countries. PAS further states that the North and Central beam transponders will be used primarily for video and data services, none of which will be interconected with the public switched networks. PAS will ensure that the international services offered over the North and Central Beam transponders will comply fully with the requirments established by the Commission in its Separate Systems decision. [3] In addition, PAS states that it intends to ensure that operation of the North and Central Beam transponders for international service will comply with all requirements established by INTELSAT in the basic PAS consultation document, AP-11-10E, (February 20, 1987). PAS reaffirms its intention to operate in acordance with the technical parameters summarized, and conditions described, in Attachment No. 1 to AP-11-10E. PAS also states that it understands that, because Attachment No. 1 involved a technical consultation for the entire PAS-1 satellite, that there should not be any need for further technical consultation with respect to the international use of the North and Central Beam transponders on the PAS-1 satellite.

DISCUSSION

5. In its Separate Systems decision[4] the Commission stated that it would not issue final authority for operation of any separate system until one or more foreign authorities had authorized use of the system and the United States Department of State (Department of State) had informed the Commission that the United States had fulfilled its obligations under Article XIV(d) of the INTELSAT Agreement. The Commission's authorizations to separate systems applicants have been so conditioned. By this Memorandum, Opinion, Order and Authorization we find that PAS has fulfilled these conditions with respect to the countries specified below and may begin to operate its facilities for communications to those countries.

6. PAS has previously been authorized to construct and operate a subregional Western Hemisphere satellite system[5] which includes eighteen 4/6 GHz transponders and six 11/14 GHz transponders on its initial satellite at the 45 degree West Longitude orbital location.[6] On September 30, 1987, the Commission authorized PAS to begin operation of its five 4/6 GHz Latin Beam transponders on the PAS-1 satellite to provide communications between the United States and Peru.[7] On October 28, 1988, the Commission also authorized PAS to operate its five 4/6 GHz Latin Beam transponders on the PAS-1 satellite to provide communications capacity between the United States and the Dominican Republic and Costa Rica and to operate its six 11/14 GHz Transatlantic Beam transponders on the PAS-1 satellite to provide communications capacity between the United States and the United Kingdom, Ireland,

Federal Republic of Germany, Sweden and Luxembourg.[8] On July 17, 1989, the Commission further authorized PAS to operate its five 4/6 GHz Latin Beam transponders on the PAS-1 satellite to provide communications capacity between the United States and Brazil, Guatemala, and Honduras and to operate its six 11/14 GHz Transatlantic Beam transponders on the PAS-1 satellite to provide communications capacity between the United States and France and Monaco.[9] On October 5, 1989, the Commission authorized PAS to provide communications capacity on its five 4/6 GHz Latin Beam transponders on the PAS-1 satellite between the United States and Argentina and the Bahamas and to operate its six 11/14 GHz Transatlantic Beam transponders on the PAS-1 satellite between the United States and Portugal and the Bahamas.[10]

7. On November 15, 1989, we received a letter from the Department of State informing us that all U.S. international consultative and informative obligations under Article XIV(d) of the INTELSAT Agreement have been fulfilled with respect to the proposed PAS services to: Denmark, Italy and the Netherlands over the six 11/14 GHz European Beam transponders; Bolivia, Chile, Colombia and Ecuador over the five 4/6 GHz Latin Beam transponders; the Bahamas and Costa Rica over the seven 4/6 GHz, 36 MHz-equivalent, North Beam transponders; and Peru over the five 4/6 GHz, 36 MHz-equivalent, Central Beam transponders.

. 8. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and (j), 308, 309 and 319 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and (j), 308, 309 and 319 (1988), that the applications for modification of authorization, File Nos. CSS-84-004-(M) and CSS-84-004-(M-1) of Pan American Satellite ARE GRANTED and PAS IS AUTHORIZED to operate seven 4/6 GHz, 36 MHz-equivalent, North Beam transponders and five 4/6 GHz, 36 MHz-equivalent, Central Beam transponders of the PAS-1 satellite for the purpose of providing services between the United States and Central and South America and the Caribbean region, subject to the terms and conditions set forth below.

9. IT IS FURTHER ORDERED that the conditions for final authorization imposed on PAS's conditional construction permit have been satisfied and PAS may proceed to operate:

A) six 72 MHz Transatlantic (Europe and CONUS) Beam transponders in the 11/14 GHz bands on the PAS-1 satellite to provide communications capacity between the United States and Denmark, Italy and the Netherlands;

B) five Latin Beam transponders (three 36 MHz and two 72 MHz) in the 4/6 GHz bands on the PAS-1 satellite to provide communications capacity between the United States and Bolivia, Chile, Colombia and Ecuador;

C) seven 36 MHz-equivalent North Beam transponders in the 4/6 GHz bands on the PAS-1 satellite to provide communications capacity between the United States and the Bahamas and Costa Rica; and

D) five 36 MHz-equivalent Central Beam transponders in the 4/6 GHz bands on the PAS-1 satellite to provide communications capacity between the United States and Peru.[11]

10. IT IS FURTHER ORDERED that the operation of PAS's system is restricted to the provision of capacity through the sale or long-term lease of transponder capacity for communications not interconnected with the public-switched message networks (except for emergency restoration service).

11. IT IS FURTHER ORDERED that this authorization only applies to the provision of communications capacity between the United States and the countries specified in paragraphs 5 and 8 above. Any communication between the United States and other locations, as well as the provision of capacity for domestic communications within Latin American Countries, will require additional consultation under Article XIV of the INTELSAT Agreement.

12. IT IS FURTHER ORDERED that the authority granted herein is specifically conditioned on operation of the PAS network in accordance with the parameters summarized and conditions described in Attachment No. 1 to AP-11-10E, "Report by the Board of Governors to the Eleventh Assembly of Parties Pursuant to Article XIV(d) on the PanAmSat Network" (February 1987).

13. IT IS FURTHER ORDERED that the Commission will retain jurisdiction over the use of all space segment within the PAS system to ensure compliance with the restrictions stated above.

14. IT IS FURTHER ORDERED that prior to use of any other transponders on the satellite, or use of the satellite for communications to or from any points other than those specified in paragraphs 5 and 8, PAS shall obtain further authority from this Commission; and prior to use of the satellite for communications to or from any INTELSAT country other than those listed above, PAS shall receive verification from that country that it has fulfilled its obligation under Article XIV(c) or (d) of the INTELSAT Agreement and PAS shall forward such verification to this Commission.

15. IT IS FURTHER ORDERED that, except as specified herein, the terms and conditions specified in PAS's construction authority still apply.

16. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] Pan American Satellite Corporation, 101 FCC 2d 1318 (1985).

[2] *Id.*

[3] Establishment of Satellite Systems Providing International Communications, 101 FCC 2d 1046 (1985), *on reconsideration*, 61 R.R. 2d 649 (1986), *on further reconsideration*, 1 FCC Rcd 439 (1986).

[4] 101 FCC 2d at 1178.

[5] Pan American Satellite Corporation, 101 FCC 2d 1318 (1985)

[6] Pan American Satellite Corporation, FCC 86-257 (released May 21, 1986).

[7] Pan American Satellite, 2 FCC Rcd 7011 (1987)

[8] Pan American Satellite, 3 FCC Rcd 6474 (1988).

[9] Pan American Satellite, 4 FCC Rcd 5751 (1989).

[10] Pan American Satellite, 4 FCC Rcd 7174 (1989).

[11] *See* INTELSAT Assembly of Parties Record of Decisions of the Fifteenth Meeting, AP-15-3E (October 1989), and INTELSAT Board of Governors Summary Record of the Eightieth Meeting, BG-80-3E (June 1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CHARTER MANAGEMENT INCORPORATED

PHOENIX NETWORK CORPORATION

CHARTER NETWORK COMPANY
transferors
and
LCI COMMUNICATIONS, INC.
transferee

File No. I-T-C-89-170-(TC)

Application for consent
to transfer control.

MEMORANDUM OPINION AND ORDER

Adopted: December 11, 1989; Released: December 18, 1989

By the Chief, International Facilities Division:

1. On September 15, 1989, the above-captioned application was filed for consent to transfer of control of Phoenix Network Corporation (Phoenix) and Charter Network Company (Charter Network) to LCI Communications, Inc. (LCI).[1] The application was placed on public notice on October 4, 1989. No comments were received.

2. Charter Management Incorporated (Charter Management) is a Kentucky Corporation which serves as a telecommunications management company and is not a holder of FCC licenses or authorizations. Charter Management is, however, the general partner in Charter Network. Charter Network, is a Georgia limited partnership which currently resells domestic and international switched voice services and has an international Section 214 authorization. Phoenix, a Georgia Corporation, also resells domestic and international switched voice services and has an international Section 214 authorization.

3. LCI, a Delaware Corporation, is a wholly-owned subsidiary of LCI Holding which, in turn, is more than 50% owned by Warburg, Pincus Capital Company, L.P. LCI Holding is merely a holding company for LCI and does not itself own, lease or operate any transmission facilities or provide any communications services. All facilities are owned or leased by, and all services are offered by, subsidiaries of LCI.

4. Pursuant to the terms of the purchase agreement, LCI will purchase all the issued and outstanding shares of the capital stock of Phoenix and Charter Management and all of the limited partnership interests of Charter Network. The Section 214 authorizations will continue to be held in the names of Phoenix and Charter Network. LCI intends to continue providing services to those customers presently being served by Phoenix and Charter Network, thus, no customer dislocation or discontinuance of service will occur as a result of this transaction.

5. We find that the proposed transfer of control detailed in the application will not entail substantial changes in the structure, management or service of either Charter Network or Phoenix. The management team for the acquired companies will be essentially the same for the immediate term. The principals of the acquired companies will continue to serve in their existing capacities. In the future LCI may centralize certain management and administrative functions of the acquired companies to streamline operations.

6. We must also address the issue of whether the proposed transaction will inhibit competition and thereby be detrimental to the public interest. Section 7 of the Clayton Act proscribes the acquisition of stock, other share capital, or assets of a company by another company "where in any line of commerce in any section of the country" the effect of such acquisition may be "substantially to lessen competition, or to tend to create a monopoly."[2] Under Section 11 of that statute the Commission is impowered to enforce Section 7 in the case of "common carriers engaged in wire or radio communications or radio transmissions of energy." [3] The courts have construed this to mean the requirements of Section 11 of the Clayton Act and the applicable provisions of the Communications Act "are satisfied when the Commission seriously considers the antitrust consequences of a proposal and weighs those consequences with other public interest factors."[4] In brief, we are required to consider anti-competitive consequences as one factor in our public interest consideration. In the present instance, both Charter Network and Phoenix are non-dominant carriers and the proposed transaction does not appear to adversely impact their respective marketplaces.

7. In view of the foregoing, we find that the public convenience and necessity will be served by approving the above-captioned application for transfer of control of Charter Network, Phoenix and Charter Management to LCI.

8. Accordingly, IT IS ORDERED that application File No. I-T-C-89-170-TC for transfer of control of Charter Network, Phoenix and Charter Management to LCI IS GRANTED.

9. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] Charter Network Company was originally Tri-J Limited holding Section 214 authorization File No. I-T-C-87-063 (released March 25, 1987), and Phoenix Network Inc. was originally Phoenix Telecommunications Corporation Inc. holding Section 214 authorization File No. I-T-C-87-068 (released March 26, 1987).

[2] 15 U.S.C. §18.

[3] 15 U.S.C. §21.

[4] United States v. FCC 652 F.2d 72, 88 (D.C. Cir. 1980).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SOUTHERN CALIFORNIA
RAPID TRANSIT
DISTRICT

Application for a
Developmental License
in the General Purpose
Mobile Service

MEMORANDUM OPINION AND ORDER

Adopted: December 1, 1989; Released: December 19, 1989

By the Commission:

I. INTRODUCTION

1. The Southern California Rapid Transit District (SCRTD) seeks expedited grant of its August 8, 1989, application for developmental licenses in the General Purpose Mobile Service. Two megahertz (901-902 MHz and 940-941 MHz) were allocated to this service for general mobile use in our *Report and Order*, GEN Docket No. 84-1231, 61 R.R.2d 165 (1986), but specific rules for the assignment of this spectrum have yet to be proposed. SCRTD plans to develop and operate a radio communications service for use both by its fleet of buses in the Greater Los Angeles area and by the Long Beach-Los Angeles Light Rail System, which is now being constructed by the Los Angeles County Transportation Commission for operation by SCRTD.

II. BACKGROUND

2. On November 10, 1983, SCRTD was granted licenses for ten channels in the Land Transportation Radio Services. SCRTD was given three years in which to construct its proposed system.[1] SCRTD did not meet this deadline, however. Instead, on December 1, 1987, over a year after construction was to have been completed, SCRTD sought waiver of Commission rules to permit additional time for construction. This request was denied by letter of January 29, 1988, as untimely, unsupported and lacking a specific implementation schedule for the future.[2] SCRTD did not seek reconsideration of this denial and its channels were subsequently recovered and reassigned to others.

III. THE PETITION

3. As the California state-chartered agency mandated to provide mass transit service in Greater Los Angeles, SCRTD states that it operates a fleet of more than 2,500 buses that each day transport approximately 1.25 million riders throughout the 2,280 square miles that make up the Greater Los Angeles area. SCRTD states that its buses serve 20,000 bus stops and travel 100,000,000 miles annually (341,000 miles each weekday).[3] Further, SCRTD reports that in July of 1990 it is scheduled to begin providing light rail service via the Long Beach-Los Angeles Light Rail System, a new system that is being constructed with an investment of over $750,000,000 in federal and local funds. The California Public Utilities Commission, however, has barred SCRTD from beginning light rail service until a suitable radio system is in place.[4]

4. According to SCRTD, its existing radio system is overloaded, outdated and inadequate to meet current communications needs. Once a bus leaves a yard, for example, SCRTD states that it cannot track its location by radio, a situation which has led to its inability to respond to several bus hijackings, with injury to passengers and drivers. Bus drivers, in turn, may face queues for routine requests-to-talk that last for up to 60 minutes, further impairing the efficiency and safety of the system. SCRTD buses are involved in 6 to 10 major or serious incidents (*e.g.* assaults, thefts, bomb threats, fires) per week, and its Transit Police respond to aproximately 250 incidents on its buses during this same time period.[5] The need for a modern communications system to handle these situations, and to meet the demands of the new light rail system, is acute, SCRTD pleads. Enhanced monitoring capability and channel capacity are essential if it is to serve its passengers and employees in a safe, efficient manner.

5. SCRTD states that it has thoroughly investigated possible sources of spectrum for a new communications system and has found none available. Frequency coordinators in the various private radio services can provide no channels in the 800 MHz or 900 MHz bands for its use.[6] Inquiries to Specialized Mobile Radio operators in the area produced only one informal quotation of $500,000 per year, a figure that SCRTD maintains is beyond its financial means.[7] The Southern California Regional Public Safety Planning Committee also cannot accommodate its needs, SCRTD maintains. All of the channels allocated to the Planning Committee have been assigned under its Regional Plan, and there is already a documented existing unmet need for approximately 180 channels, much of it by agencies having priority over SCRTD under established guidelines.[8]

6. In the absence of alternatives from more conventional sources, SCRTD seeks frequencies allocated to the General Purpose Mobile Service. Given the importance of its proposed service and the innovative nature of its design, SCRTD asserts that its system would provide a particularly appropriate use of these frequencies. Further, as SCRTD has now executed a contract for construction of its proposed system and established an implementation schedule for its installation, actual utilization of the spectrum is assured, it argues.[9] SCRTD does not, finally, seek a permanent allocation for its service. Acknowledging that service rules have not been developed for General Purpose Mobile Service frequencies, it seeks a developmental license to permit immediate construction and operation. As soon as other appropriate frequencies became available, SCRTD states that it would move to those frequencies, allowing others to be licensed in the General Purpose Mobile Service.

7. Turning finally to the equities of its situation, SCRTD expresses regret at its failure to seek a timely extension of its construction deadline. A "unique confluence of events beyond SCRTD's control" left it unable to comply with Commission requirements, SCRTD as-

serts.[10] SCRTD argues, however, that the citizens of Los Angeles desperately need a modern transit radio system. Their lives should not be endangered, and the $750,000,000 in federal and local funds expended for a light rail system needlessly wasted, as a result of its bureaucratic problems, SCRTD pleads.

IV. DISCUSSION

8. In emphasizing the public interest considerations underlying its request, SCRTD relies heavily upon our Memorandum Opinion and Order, *New York City Transit Authority*, 4 FCC Rcd 4488 (1989), wherein we reinstated channels that had been granted the New York City Transit Authority for use in a city-wide bus radio system. Citing the overwhelming public need for a safe, efficient urban mass transportation system, we concluded that the procedural deficiencies of the various local government bodies responsible for construction did not outweigh the public interest considerations favoring the proposed system.[11] A similar conclusion is warranted here.

9. However, SCRTD's failure to pursue its administrative remedies, and in particular its failure to seek reconsideration of the cancellation of its licenses and of their recovery for reassignment, creates difficulties not present in the New York City Transit Authority case. The Transit Authority had sought timely reconsideration of its license cancellation, leaving its channels available for reinstatement once final action was taken. SCRTD, in contrast, has lost access to its original assignment because of its delay. The remedy afforded the New York City Transit Authority is accordingly not available to SCRTD, and we must find spectrum elsewhere if we are to meet the needs of Los Angeles' bus riders and potential light rail users.

10. We reject at the outset SCRTD's request for General Purpose Mobile Service frequencies. When we set aside spectrum for this new service, we chose expressly to postpone development of specifics for its operation. 61 R.R.2d at 198. Granting SCRTD a license now could compromise this development, eliminating much-needed flexibility. SCRTD argues in this regard that it seeks only a temporary authorization, and that it will move to technically compatible channels when they become available. Experience teaches, however, that the very act of constructing and operating even a "temporary" or "experimental" facility often creates equities in its retention.[12] Where, as is the case here, suitable substitutes may not be available, restraint is warranted.[13]

11. We find, in any event, that an alternative is available. SCRTD has established a need for additional channels to assure operation of the new light rail service between Los Angeles and Long Beach. We have recently recovered channels in the Land Transportation Radio Services and have decided to assign five of them directly to SCRTD for this purpose.[14] The public interest concerns underlying SCRTD's request and the issues of safety and efficiency in the provision of mass transportation to the Los Angeles area justify waiving normal assignment procedures, including the frequency coordination requirements of Sections 90.129 and 90.175 of our Rules, 47 C.F.R. §§ 90.129 and 90.175, to provide quick and certain grant of channels to meet SCRTD's needs.[15]

12. At the same time, SCRTD has not justified grant of additional channels for its bus service. SCRTD is the licensee of a 10 channel 470 MHz radio system that it uses for its bus operations. Utilizing this system more efficiently by, for example, employing digital or other operating techniques to permit more intensive use of these channels, should meet SCRTD's need for improved bus communications. At the very least, we would expect SCRTD to exhaust all possibilities for enhanced operation on existing channel assignments before requesting additional scarce spectrum for its use.

13. We emphasize that the equities here flow not from SCRTD itself, but from its bus and potential light rail passengers. SCRTD did not pursue construction of its system in a diligent fashion and failed as well to seek the administrative remedies that were available to it. In the final analysis though, we conclude here, as we did in the *New York City Transit Authority* case, that the citizens of Los Angeles should not bear the cost of these errors. We will therefore permit SCRTD to file directly with the Private Radio Bureau's Licensing Division an application for five channels in the Land Transportation Radio Services consistent with this Memorandum Opinion and Order. We will hold these channels in reserve for SCRTD for a period of 30 days from the release of this Memorandum Order and Order. If an application is not submitted within this time period, we will make the channels available for assignment under normal procedures.

V. ORDERING CLAUSE

14. Accordingly, IT IS ORDERED that the Application for a Developmental License in the General Purpose Mobile Service filed by the Southern California Rapid Transit District IS DENIED.

15. IT IS FURTHER ORDERED that the Southern California Rapid Transit District MAY FILE with the Licensing Division, Private Radio Bureau, an application for additional frequencies consistent with this Memorandum Opinion and Order.

16. IT IS FURTHER ORDERED that pursuant to Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3, Sections 90.129 and 90.175 of the Commission's Rules, 47 C.F.R. §§ 90.129 and 90.175, ARE WAIVED to permit submission of the application authorized herein. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Section 90.629 of our Rules, 47 C.F.R. § 90.629, permits construction periods of up to three years for large, complex systems and for systems to be built by local governmental agencies subject to multi-year planning, approval and funding cycles.

[2] Letter to Jeremiah Courtney from Terry L. Fishel, Chief, Land Mobile Branch, Licensing Division, Private Radio Bureau.

[3] SCRTD Petition for Expedited Grant (Petition) at 2, 9.

[4] *Id.* at 2, 10.

[5] *Id.* at 7-10.

[6] *Id.* at 3, 14.

[7] *Id.* at 3, 17-18. *See* also the affidavit of Frank M. Haddon, Assistant Director of the Facilities Management Department of the Southern California Rapid Transit District, submitted as an attachment to the SCRTD petition.

[8] *Id.* at 3, 20-21. *See* also the affidavit of Alan F. Pegg, General Manager of the Southern California Rapid Transit District and the April 7, 1989, letter to Mr. Pegg from Garrett G. Mayer, Chairman, Southern California Regional Public Safety Planning Committee, both submitted as attachments to the SCRTD petition.

[9] A copy of a contract between General Railway Signal and SCRTD and an implementation schedule calling for completion of the communications system by September, 1991, are attached to the SCRTD petition.

[10] SCRTD states that these events included a lengthy and complex protest to the initial selection of a general contractor for the project and an earthquake that severely damaged SCRTD's headquarters building. Petition at 14-16.

[11] 4 FCC Rcd at 4489.

[12] *Compare* Community Broadcasting Co. v. FCC, 274 F.2d 753 (D.C. Cir. 1960), wherein the Court of Appeals admonished the Commission to consider the prejudicial effects of a grant of interim operating authority to one of several competing applicants for a permanent broadcast authorization. The Court noted that the interim operator's expenditure of sizeable funds on its temporary operation would inevitably influence the Commission's final decision, no matter how much the Commission tried to eliminate this factor.

[13] SCRTD maintains, for example, that it would have to review potential permanent assignments for technical compatibility with its existing system. Petition at 6.

[14] These channels are 811/856.8875 through 815/860.8875 MHz and were licensed to the Taylor Bus Service, Los Angeles, California, under the call sign WNJU-973. By letter of September 29, 1989, we notified the Bankruptcy Trustee of the Taylor Bus Service Estate that these licenses had cancelled for discontinuance of station operation under the provisions of Section 90.157 of our Rules, 47 C.F.R. § 90.157. In an untimely response to this notice, counsel for the Trustee has suggested that the licenses are subject to the automatic stay provisions of the Bankruptcy Code found at 11 U.S.C. § 362. Applicable law holds otherwise, however. *See, e. g.*, In re D.H. Overmeyer Telecasting Co., Inc., 35 B.R. 400, 403 (Bankr. N.D. Ohio 1983). The Bankruptcy Trustee was so notified by letter dated November 14, 1989.

[15] *See* WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969).

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 89-599

In the Matter of

Amendment of Parts 0, 1, 2, and 95 of the Commission's Rules regarding the establishment of a Personal Emergency Locator Transmitter Service. RM-6681

NOTICE OF PROPOSED RULE MAKING

Adopted: December 12, 1989; Released: December 20, 1989

By the Commission:

I. INTRODUCTION

1. This *Notice of Proposed Rule Making* (*Notice*) proposes to establish a Personal Emergency Locator Transmitter Service (PELTS) to provide individuals in remote areas a means to alert others of an emergency situation and to help search and rescue personnel locate those in distress.

II. BACKGROUND

2. There is no way to predict when and where emergencies will occur. If they occur in cities and towns where the vast majority of the American public live and work there is a modern communications network available to summon assistance. For example, in most cities and towns across the country the emergency telephone access system (911) is available to notify authorities in a matter of seconds of an emergency. Even rural America has access to a communications network to summon assistance. As a result of this extensive communications network, the ability to notify authorities in the event of an emergency is often taken for granted.

3. There are, however, large remote areas of the United States where there is no communications capability available, emergency or otherwise. These areas are used by a large segment of the American public for recreational activities. In fact, the number of individuals participating in outdoor activities such as backpacking, hiking, mountain climbing and snowmobiling in remote areas has increased dramatically over the last five years.[1] As the number of persons participating in such activities has increased so has the number of situations requiring immediate assistance (*e.g.*, individuals getting lost or requiring emergency medical assistance).[2] For example, in May of 1986, nine teenage climbers got caught in a severe, unexpected storm while trying to climb Oregon's Mount Hood and lost their lives. The climbers, who were buried under four feet of snow, might have been saved had it not taken rescuers over three days to locate them. [3] In February 1987, four skiers lost their lives after being buried for three days by an avalanche in the back country of Breckenridge, Colorado. They too might have been saved if rescuers had been able to locate them.[4] Such fatal accidents have increased the awareness among individuals participating in outdoor activities in remote areas of their inability to summon assistance if and when it is needed.

4. Recently, the growing awareness of inadequate emergency communications capabilities and the limited appeal of the various alerting devices currently available have led the people to use emergency locator transmitters (ELTs) and emergency position indicating radiobeacons (EPIRBs) which are alerting devices that are not intended for use by the public in general. These emergency radiobeacons are currently used in an international system to alert others of distress situations in ships and aircraft and to aid search and rescue services to locate those in distress. In the United States, emergency radiobeacons carried on board aircraft are called ELTs. ELTs are small, portable, readily available and relatively inexpensive. In the event of a crash the ELT is activated automatically by means of a crash activation sensor. Radiobeacons carried on board ships are called EPIRBs and are generally larger and not as portable as ELTs. In the event of distress EPIRBs may be activated automatically or manually and some are designed to float free of a sinking vessel. ELTs and EPIRBs are currently designed to operate on identical frequencies, 121.500 MHz and 243.000 MHz[5], which are allocated internationally for alerting and for search and rescue functions involving ships and aircraft in distress. Additionally, the Commission recently amended its rules to allow ships to voluntarily use emergency radiobeacons operating on 406.025 MHz.[6] The frequency 406.025 MHz is also dedicated internationally for exclusive use by distress beacons.

5. The U.S. Air Force is responsible for monitoring and providing search and rescue services for land based distress situations while responsibility for search and rescue along the coast of the United States rests with the Coast Guard. Distress signals are detected by aircraft, vessels, or a number of COSPAS/SARSAT[7] satellites, which retransmit the signal to special ground stations called Local User Terminals. From a Local User Terminal the signal is transfered to the U.S. Mission Control Center at Scott Air Force Base (Scott) in southwestern Illinois. The vicinity of the radio beacon emitting the distress signal is determined and the positions are relayed from the control room to the Air Force's Rescue Coordination Center at Scott where data are analyzed and local rescue units are notified. Additionally, Federal Aviation Administration (FAA) control towers, Coast Guard installations, military aircraft and military installations monitor the frequencies and handle local situations that do not need intervention from Scott. The ELT/EPIRB system has been designed specifically to handle aircraft and vessels in distress. It is not designed to accommodate the general public, which could add millions of users to the system. The addition of a large number of users, especially users unfamiliar with the use of radio, could render the entire ELT/EPIRB system useless. Along with an increase in unsophisticated users that could undermine the system, the system is currently experiencing problems with false alarms. ELTs

may transmit many false alarms due to hard landings, mishandling or problems related to beacon design, installation or maintenance. EPIRBs also generate false alarms but mostly due to mishandling. Thus, the proliferation of unauthorized users does not add to safety but decreases it as the system becomes overloaded.

6. Currently an increase in advertising in various magazines has led individuals to use aircraft emergency locator transmitters (ELTs) as personal emergency locators. ELTs at first appear to be suited for this purpose in that they are small, portable, readily available and relatively inexpensive with an international watch and response system already in place. The misuse of ELTs as personal emergency locators, however, strains the watch and response system, increases the cost of tracking and responding to distress alerts[8] and, if allowed to continue, could overload the system, rendering it useless. The Commission recently warned the public against intentional misuse of ELTs. Unauthorized personal use of ELTs could result in a penalty of imprisonment and a forfeiture of up to $10,000.[9]

7. In response to the proliferation of illegal use of ELTs, the limitations of current alerting devices, and the potential of personal emergency locator beacons, the Interagency Committee on Search and Rescue (ICSAR)[10] formed an Ad Hoc Study Group (Group) on Personal Locating Beacons. ICSAR asked the Group to develop a position and make recommendations on the application of technology for user groups other than those legally employing ELTs and EPIRBs. The Group concluded that the potential widespread use of personal locating beacons would cause problems for the current watch and response systems and recommended that the U.S. learn from earlier experience with ELTs and remain ahead of the public's demand for personal locating beacons. In addition to the interest in the United States, several countries, including Norway, Denmark, Sweden, France, and the United Kingdom, foresee an immediate application for personal emergency locator transmitters and have presented draft subject papers at various international meetings.[11]

8. Further, on January 13, 1989, Kenneth J. Seymour filed a petition (RM-6681) requesting that the Commission's Rules for the Radio Control (R/C) Service, 47 C.F.R. Part 95, Subpart C, be amended to allow for personal use of direction finding and tracking equipment. The purpose would be to provide frequencies to locate lost children, pets, or hikers and to recover personal property. Mr. Seymour states that there are over 8 million active campers, hikers, and the like who would be potential users and who would gain large benefits from such equipment. On March 31, 1989, The Academy of Model Aeronautics, Inc. (AMA) filed an opposition to Seymour's petition stating that the intended use of the tracking devices fails to qualify for operation under the R/C Rules and would be incompatible with existing R/C services.

III. DISCUSSION

9. The key factor in providing effective emergency assistance is response time -- the time it takes from the start of the emergency until the victim is provided with appropriate care. To minimize response time to emergencies in remote areas there must be a viable means available to let someone know that an emergency condition exists. The quickest and easiest way to bridge the distance gap between a remote area and assistance is through the use of radio.

10. In the past the Commission has adopted rules to provide for emergency locator beacons for aircraft and ships to alert others of distress or emergency conditions.[12] These rules were intended to implement a safety system using the frequencies allocated internationally for this purpose and using the responsible agencies to monitor the frequencies and respond to distress alerts. Currently, however, no such communications capability exist solely for individuals in distress in remote areas. Indeed as ICSAR noted, other than citizens band (CB) radio and some low power communication devices authorized under Part 15 (47 C.F.R. Part 15),[13] there are no other electronic alerting options regularly available to the general public.[14] Instead, participants in recreational activities in remote areas have had to rely on a variety of alerting devices such as smoke flares, strobe lights, signal mirrors and balloons.

11. While all of these alerting devices have been of some assistance to those who have been lost or victims of accidents, they have disadvantages that have kept them from being extensively used for distress communications. CB radio, for example, has limited appeal in this regard because of the equipment design, the quality of the communications, and potential for skip interference. The low power devices authorized under Part 15 have a very limited range and no requirement for interoperability or system design. The non-electronic alerting devices are also very limited. One problem has been the inability of these devices to differentiate the seriousness of the situation. Further, the success of many of these devices depends on a number of factors such as the sophistication of the user and the area in which the device is used. Most of the non-electronic devices require the user to be in close proximity to the watch and response personnel. This usually occurs only after a search and rescue (SAR) organization has been alerted that a potential emergency condition exists and has started its search. This could be hours or even days after the emergency first occurs.

12. This lack of a viable means of alerting appropriate authorities has lead to the proliferation of improper use of ELTs. Because ELTs are life saving devices used worldwide, it is important that they operate as efficiently and effectively as possible to ensure that search and rescue teams will be able to detect the distress signal and locate the source. Available SAR resources between now and the year 2000 are not expected to increase substantially. Thus, the potential inadvertent or improper use by a very large segment of the American public could render the existing aviation and maritime distress and safety systems ineffective. While there is no practical way to ascertain the size of the personal locator beacon market, a recent study has estimated the number of potential users to be in the millions and growing.[15] Further in this regard, ICSAR concluded that the near future use of Personal Locating Beacons is probably imminent, with or without official and legal sanction.[16]

13. Finally, we note that over the past decade, satellites have become increasingly useful in emergency and disaster situations. For example, they have been used for disaster and emergency relief communications in Nicaragua, Mexico City, Italy, Mali, the Soviet Union and the United States (*i.e.*, after the Mount Saint Helens eruption). Further, the COSPAS/SARSAT system that piggybacks aboard U.S. and Soviet weather and navigation satellites has al-

ready saved many lives by locating ELT and EPIRB distress transmissions. A new satellite system dedicated to such services, however, would take years to implement and would require large national and international commitments. Such a system could not easily be implemented by local authorities quickly and inexpensively.

14. In order to accommodate the evolving demands of the public, we are proposing a new personal radio service for use by the general public for distress communications in remote areas. This new radio service would benefit professionals such as game managers, lumbermen and scientists as well as recreational enthusiasts. Under the approach proposed herein we would rely on local government entities and private safety related organizations to develop associated watch and response systems.

15. Although we put forward our specific proposal below, we seek comment on viable alternatives to that proposal. Our proposed version would offer the user several means of communication and be an important source of information. This system, however, could be expensive and, thus, arguably beyond the financial means of some who would want to use it. Thus, comments are sought on possible alternatives to reducing the system's costs. For example, one alternative would be to modify the technical standards in order that the equipment would be cheaper to manufacture. Further, as we are proposing a system that uses ten 5 kHz channels, commenters should address whether ten channels are necessary and whether using fewer channels would reduce the cost of the system. Finally, we request comment generally on the status of satellite services such as those being developed by Geostar Corporation and the American Mobile Satellite Corporation, that might be adaptable for distress communications in remote areas. In short, we solicit comments on these questions as well as any other options that would make this proposed service as efficient and effective as possible.

IV. PROPOSAL

16. Before enunciating our specific proposals for this new service, we want to state our objectives in this proceeding. In brief they are (1) to provide for an area wide, centrally-coordinated radio communications capability for use by the general public in remote areas for the purpose of reducing response time in emergency situations and (2) to reduce the illegal use of ELTs and EPIRBs as personal locating beacons. These goals are necessitated by the rapidly increasing segment of the American public either working or participating in recreational activities in remote areas, their growing desire to be able to summon emergency assistance, if and when it is needed, and the increasing sophistication in personal locating beacon technology.

A. Regulatory Structure

17. *Rule Part.* Currently, frequencies set aside for land mobile safety services are regulated under Part 90 of the Commission's Rules, 47 C.F.R. Part 90. In these services the general public is the recipient of the safety services provided by radio rather than an actual user of the frequencies. In fact the general public is not even eligible to use frequencies reserved for public safety under Part 90. This new service, however, is intended to satisfy the individual emergency communication needs of the general public and they would be the actual users of the frequencies. Therefore, we propose to establish a new radio service, the Personal Emergency Locator Transmitter Service (PELTS) as one of the Personal Radio Services under Part 95 of the Commission's Rules, 47 C.F.R. Part 95.[17]

18. *Eligibility.* As stated above, this new radio service is intended to provide an emergency communications capability for the general public in remote areas. Under the radio system envisioned, the alert that an emergency condition exists would first come from a portable (mobile) unit. We propose not to restrict eligibility in regard to mobile operation under PELTS. Given the potential large class of users who could benefit from this service, the approach of not restricting eligibility will maximize the usefulness of this service to the public. Under this proposal anyone located in an area where radio services are regulated by the Commission could operate a PELTS portable station. We believe, however, base stations should be treated differently. Base stations use higher power and thus pose a greater risk of interference. Further, to ensure that base station use is limited to distress and assistance communications we propose to restrict eligibility to governmental entities and private organizations who provide a search and rescue service and are recognized as providing such by a governmental entity.[18] By proposing unrestricted eligibility for mobile use and restricting base station eligibility we hope to allow maximum use of these frequencies to report emergencies while at the same time assure that the frequencies will be used for distress as well as search and rescue communications.

19. *License Requirements.* Because of the broad eligibility and operational provisions of this service there are millions of potential users. Individually licensing each one could be costly to the Commission. Further, under our proposal individual mobile licensing would not be needed to limit the number of users, assign specific channels,[19] limit output power or control hours of operation. Rather we anticipate satisfying our spectrum management responsibilities through type acceptance and operating rules. For these reasons, we believe there is no need separately to license individual portable stations.

20. We could accomplish this two different ways. One option would be to authorize mobile operation by rule as we have done in several other Personal Radio Services.[20] While this option would provide the most flexibility (*i.e.*, individuals could independently own and operate PELT portable units), it would require an amendment to the Communications Act of 1934, as amended.[21] The other option would be to include mobile units under the base station license. An example of this type of blanket or system licensing is found in the common carrier Domestic Public Land Mobile Service. *See Individual Radio Licensing Procedures*, 77 FCC 2d 84 (1980). A similar approach is used in the cellular radio service and for private carriers in the private land mobile radio services. For example, *see* 47 C.F.R. § 90.179(d). Under this option the base station licensee would also be the holder of the mobile license and individuals would rent service from base station licensees. In either case, eliminating individual mobile licensing would not free the users from complying with operational rules, but it would free them of any requirement to obtain an FCC license before beginning operation. For the purposes of this Notice we propose the blanket licensing option. Nevertheless, we specifically request comments on other licensing alternatives.

21. Base stations present a different situation. Here we intend to limit users to assure the frequencies will be used for distress and assistance communications.[22] Further, we anticipate only a small number of base stations compared to the number of portable stations thus keeping the Commission's administrative costs down. Finally, licensing base stations assures that proper FAA notification and subsequent clearance by the Commission will be obtained for antenna structures. For these reasons, we believe base stations should be treated differently. We propose to require entities to obtain a Commission authorization prior to operating a PELTS base station.

22. *Filing Requirements.* As indicated above, we propose to license only PELTS base stations. Applicants would use FCC Form 574 for new authorizations, modifications, and assignments. No licensing fee would be required.[23] Our specific licensing proposals are outlined in the attached Appendix.

B. Channelization

23. *Spectrum Allotted.* With the increased demand for spectrum over the last ten years, finding spectrum for a new radio service is difficult. If we provide only for emergency alerting capability similar to ELTs or EPIRBs (*i.e.*, ballot one or two frequencies), our job would be less complex. While this capability would go a long way toward satisfying our objective, we believe additional capability is needed. The search and rescue community has indicated the need for two-way communications capability both to determine the seriousness of the situation and to provide reassurance to the victim.[24] Further, it would help if rescuers had the capability to communicate with one another while searching for the injured or lost party. For these reasons, we believe a number of frequencies should be allotted.

24. In addition to the number of channels to be allotted, several other factors need to be considered in our search for frequencies. For example, we need to consider what the impact would be on existing users. Further, we should consider propagation characteristics of the various bands in relation to where the frequencies would be used and what they would be used for. For instance, we would not want to allot for emergency communications in heavily wooded remote areas frequencies that are severely attenuated by forestation or frequencies that are routinely subject to atmospheric conditions such as skip. Mr. Seymour suggested frequencies in the 72-76 MHz band. While frequencies in this band provide good propagation in wooded areas and offer sufficient range capabilities without serve skip problems, there is the issue of impact on existing users.[25] Further, there are trade-offs in antenna design associated with portables operating in this band. We believe frequencies in the newly allocated 220-222 MHz band, however, may be better suited than the R/C frequencies proposed by Mr. Seymour. This band also has good propagation characteristics. Further, there would be no impact on existing users and the antenna trade-off problem is not as great. On balance we are proposing to reserve channels in the 220-222 MHz band for this service. We request comments on the choice of frequencies proposed for this service.

25. In a recent *Notice of Proposal Rule Making* we proposed service rules for the 220-222 MHz band.[26] In the channeling plans proposed, the lowest common denominator is a 5 channel block. Accordingly, we propose to allot one 5 channel block, five frequency pairs (channels 196-200), to PELTS.[27] This communications capability should be sufficient to provide entities with the opportunity to design an emergency communications system in remote areas.[28] We invite comment on the number of channels proposed for this service.

26. *Channel Bandwidth.* In the proceeding reallocating the 220-222 MHz band for land mobile use the Commission stated that the band was being reallocated to develop narrowband technologies.[29] Further, in the recent *Notice of Proposed Rule Making* concerning service rules for this band we proposed to divide the band into two hundred 5 kHz channel pairs.[30] We see no reason to deviate from this direction herein. We propose, therefore, a channelization plan based on 5 kHz channels.

27. *Channeling Plan.* As discussed above, the new service should provide for an alerting capability similar to that provided by ELTs and should provide for voice communication capability between the injured or lost party and the watch and response center. It should also provide common (working) channels for communications between different rescue squads or individuals participating in the search. Finally, we believe the ability to receive informational voice transmissions pertaining to weather conditions, hazards, closings, where to obtain first aid or other assistance, etc. also would be beneficial to individuals participating in recreational activities in remote areas. Providing frequencies for these different capabilities will allow the private sector to provide an emergency communications system.

28. Table one contains the proposed channel plan for the five frequency pairs. We propose to reserve two frequency pairs (channels 1/6 and 2/7) for full duplex emergency and assistance voice communications between persons needing assistance and a watch and response center. The lower side would be reserved for base station operation and the upper side for portable operation. We propose to prohibit mobile relay (mobile-to-mobile communications through a base station) on these frequencies to ensure they are used for emergency and assistance communications (*i.e.*, all communications would be to or from a dispatcher). The remaining three pairs will be divided into six single channels. We propose to reserve a frequency (channel 3) for one-way non-commercial informational-type messages. We propose to reserve a frequency (channel 10) for non-voice emergency alerting and homing operations similar to ELT operations. Finally, we propose to reserve the remaining four frequencies (channels 4, 5, 8 and 9) for short-distance simplex communications. For example, a backpacker would use his portable unit at the beginning and during his outing to monitor Channel 3 for information about weather conditions, hazards and trail closings. Should he/she be injured during his/her outing he/she would be able to alert search and rescue personnel either by using Channel 10 to send a distress signal or by communicating with the base station using Channels 6, or 7. Additionally, the backpacker could use Channels 4, 5, 8, and 9 for short range communications with other parties that might be in the area and available to offer assistance. Once search and rescue personnel respond they will be able to locate the injured backpacker by homing in on Channel 10 and then use Channels 4, 5, 8, and 9 to communicate with the injured party to determine the extent of the injury and to offer instruction and reassurance.

TABLE 1

Frequency (MHz)	Channel Designator	Use
220.9775	1	Assistance/Emergency (Base)
220.9825	2	Assistance/Emergency (Base)
220.9875	3	Information (Base)
220.9925	4	Short-distance (Mobile)
220.9975	5	Short-distance (Mobile)
221.9775	6	Assistance/Emergency (Mobile)
221.9825	7	Assistance/Emergency (Mobile)
221.9875	8	Short-distance (Mobile)
221.9925	9	Short-distance (Mobile)
221.9975	10	EmergencyNotification/ Homing

29. We are currently working with the National Telecommunications and Information Administration (NTIA) to determine the procedure to be followed in sharing the spectrum with Government users. We anticipate that the Government and non-Government users will share the spectrum on a co-equal basis. Government users may desire to use this spectrum in the numerous parks which are operated by the Government and open to the general public for recreational activities. Also, our current treaty with Canada for licensing land mobile operations does not cover use of the 220-222 MHz band.[31] We intend to work with Canada concerning this issue.

30. *Frequency Availability*. There are a number of different ways we could license these frequencies. The easiest way is for us to make the frequencies available on a shared basis among all users. All licensees and users would be expected to cooperate in the use of channels in order to reduce interference. The drawback of this approach is that several different entities in the same area could be operating on the same channel. The chance of this happening here is particularly high because of the limited number of frequencies available. There are other licensing alternatives that could resolve this problem. For example, we could require users in an area to submit a joint plan describing how the frequencies will be used, similar to our means of allocating new public safety frequencies.[32] Alternatively, we could license a single communication provider in a local area as we do for airline enroute frequencies.[33] The two alternatives, however, could result in an additional workload on the Commission at a time when our resources are severely limited. For the purposes of this *Notice*, therefore, we propose to make the frequencies available on a shared basis. Nevertheless, we specifically request comments on whether another licensing approach should be used.

C. Technical Considerations

31. *Emission Mask*. Again to keep technical operation on these frequencies consistent with private land mobile use of the 220-222 MHz band, we propose to adopt the same emission mask as specified in PR Docket 89-552 regardless of the modulation technique used. Under the proposed mask, no emission attenuation is required for frequencies up to 1.8 kHz offset from the carrier frequency. Attenuation of emissions for frequencies offset beyond 1.8 kHz from the carrier would increase until frequencies 5 kHz and more away are attenuated by at least 80 dB. Because there is some concern this mask may be overly restrictive and thus possibly result in higher priced equipment, we specifically request comments on this issue.[34] Comments should address the tradeoffs in cost versus adjacent channel interference and the possibility of employing a reduced standard for low power portable units.

32. *Frequency Tolerance*. We are proposing a frequency tolerance of 0.0001% for base stations and 0.00015% for portable units operating under PELTS. This is consistent with our approach to employ the same equipment technical standards as those proposed for private land mobile use of the 220-222 MHz band.

33. *Transmitter Power*. Unlike frequencies available for private land mobile use in the 220-222 MHz band, we are not proposing to assign PELTS frequencies on an exclusive basis. Consequently, there is no reason to specify a co-channel base station separation. Nevertheless, we believe the rules should provide some maximum power limit to reduce interference potential. We propose, therefore, a maximum output power for PELTS base stations of 100 watts and for portable units of 3 watts. We specifically request comments on whether these values are sufficient to provide the coverage area needed.

D. Equipment Standards

34. As we have continued to emphasize, our primary goal is to establish a new radio service that will enable local entities to provide a distress, search and rescue capability as well as information services for the general public in remote areas anywhere in the country. Individuals participating in recreational activities such as hiking and mountain climbing do not always do so at the same location. Further, search and rescue groups never know where the next emergency may be. In short, having some basic compatibility standards (*i.e.*, interoperability) would increase significantly the utility of the personal emergency locator transmitter for each individual, and improve the efficiency of search and rescue operations as well as increase the chance that the distress communication will be received. For these reasons, we propose to allow only amplitude compandored single sideband (ACSB), J3E or J2D emission, on PELTS frequencies. Further, each portable unit must have the capability to transmit on channels 4, 5, 6, 7, 8, 9 and 10 and receive on channels 1, 2, 3, 4, 5, 8 and 9. These basic standards will permit the general public to communicate on all available channels as needed regardless of location or equipment manufacturer. We also solicit comments on whether other interoperability standards are needed. For example, should we specify the modulation sweep range and rate for operation on channel 10 and if so what should they be? Should there be standards for homing transmissions on channel 10 such as duty cycle and if so what should it be?

E. Design Requirements.

35. When the Commission established rules for ELTs and EPIRBs it specified certain equipment design standards. PELTS, like ELTs and EPIRBs, is designed to promote the safety of life and property. Further, just as with EPIRBs and ELTs, PELT transmitters are expected to function in other than ideal environmental conditions. While we cannot guarantee that a portable transmitter will function in all conditions, specifying certain equipment design characteristics could assure that the equip-

ment is intrinsically safe and is likely to perform its intended function. Listed below are some equipment design requirements that could be required. We request comments on these and any additional requirements that would be beneficial.[35] We also request comments on whether we should specify a testing procedure for these requirements.

(1) Portable units must have a positive means of turning the equipment off. When an on-off switch is employed a guard must be provided to prevent inadvertent operation.

(2) The exterior of the equipment must have no sharp edges or projections. Means must be provided to fasten the equipment to a person.

(3) Portable units must be powered by a battery contained within the transmitter case and be equipped with a visual indicator of a low battery condition. The visual indicator must indicate when 75 percent of its useful life has expired.

(4) Portable units must have operating instructions understandable by untrained personnel permanently displayed on the outside of the equipment.

(5) Portable units must have an attached warning label clearly stating that channel 10 is to be used only for emergency alerting and is effective only in areas where there is a watch and response system in place.

(6) Portable units must be waterproof and float in calm fresh water with at least the upper 10 cm (4 inches) out of the water.

(7) Portable units must have a visible or audible indicator that clearly shows that the device is operating. The indicator must be protected from damage due to dropping or contact with other objects.

(8) Portable units must meet the requirements of subparagraphs (1) through (7) of this section after free falls onto hard surfaces 3 times from a height of 18 meters (60 feet).

F. Summary

36. This proposed new service is intented to provide a distress as well as search and rescue communications capability for use by the general public in remote areas, with emphasis on a local system approach in providing radio communications. While radio communications are the integrating force in emergency response systems and are necessary to the success of such systems, such capability is only half of the picture. Without a corresponding watch and response system, the communications capability is wasted. This proposal provides state and local governments and certain private entities the communications capability needed to maximize the effectiveness of watch and response systems.

V. INITIAL REGULATORY FLEXIBILITY ANALYSIS

37. Pursuant to the Regulatory Flexibility Act of 1980 (Pub. L. 96-354), our initial analysis is as follows:

Reason for Action

38. We propose to adopt a new Personal Emergency Locator Transmitter Service (PELTS) to address an identified but unmet need for emergency radio communications.

Objectives

39. The objective of the proposed rules is to provide personal emergency communications and alerting capabilities in remote areas.

Legal Basis

40. The proposed action is authorized under Sections 4(i), 303(f) and (r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(f) and (r).

Reporting, recordkeeping and other compliance requirements

41. PELTS base stations would be licensed and the licensee required to maintain station records for the license term, including: (1) the license, (2) copies of letters from the licensee to the FCC concerning name or mailing address changes, (3) copies of answers to discrepancy notices, (3) an STA or waiver of these rules, (4) copy of any renewal application submitted to the FCC and not yet acted upon, (5) a copy of any FCC waiver to use an antenna higher than the rules normally allow, and (6) a copy of the FCC consent to a licensee corporation's change in its corporate control.

Federal rules which overlap, duplicate, or conflict with these rules

42. These proposed rules do not overlap, duplicate or conflict with other Federal rules.

Description, potential impact, and number of small entities involved

43. We have included an Initial Regulatory Flexibility Analysis in this document because we cannot, at this juncture, determine with any specificity the number of manufacturers who would avail themselves of the opportunity to make PELTS equipment, or the number of small entities that would be users of the PELTS. Moreover, we are soliciting comment on the very nature of the service and the equipment to be used in the service. We will examine this proceeding's impact on small entities further in the Final Regulatory Flexibility Analysis in this proceeding after evaluation of the relevant comments. We believe, however, that any impact will be beneficial.

Any significant alternatives minimizing the impact on small entities and existing licensees and consistent with the stated objectives

44. Since we are soliciting comment on the very nature of the service and the equipment to be used in the service we are unable to evaluate any significiant alternatives minimizing the impact of small entities and existing licensees. We will examine significant alternatives that minimize the impact on small entities further in the Final Regulatory Flexibility Analysis in this proceeding after evaluation of the relevant comments.

VI. PROCEDURAL MATTERS

45. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new information collection requirement on the public. Implementation of any new requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

46. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* 47 C.F.R. § 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. *See* 47 C.F.R. § 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. *See* 47 C.F.R. § 1.1203.

47. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. *See* 47 C.F.R. § 1.1202(b). Any person who makes or submitts a written *ex parte* presentation shall provide on the same day it is submitted two copies of same under separate cover to the Commission's Secretary for inclusion in the public record. The presentation (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding(s) to which it relates and the fact that two copies of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation.

48. Any person who is making an oral *ex parte* presentation presents data or arguments not already reflected in that person's written comments, memoranda, or other previous filings in that proceeding shall provide on the day of the oral presentation an original and one copy of a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. The memorandum (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding and the fact than an original and one copy of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation. *See* 47 C.F.R. § 1.1206.

49. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **March 20, 1990** and reply comments on or before **April 19, 1990.** All relevant and timely comments will be considered by the Commission before taking final action in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original and nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street N.W., Washington, D.C. 20554.

50. It is ORDERED that a copy of this Notice of Proposed Rule Making will be forwarded to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Parts 0, 1, 2, and 95 of Title 47 of the Code of Federal Regulations are proposed to be amended as follows:

1. The authority citation for Part 0 continues to read as follows:

Authority citation: 47 U.S.C. 154, 303 unless otherwise noted. Implement 5 U.S.C. 552, unless otherwise noted.

2. Section 0.401(b)(4)(i) is amended by adding the following after General Mobile Radio Service (FCC Form 574 only): Federal Communications Commission, General Mobile Service, P.O. Box 360373M, Pittsburgh, PA 15251-6373:

§ 0.401 Location of Commission Offices.

* * * * *

(b) * * *

(i) * * *

Personal Emergency Locator Transmitter Service (FCC Form 574 only):

Federal Communications Commission, ATTN: PELT Service, Gettysburg, PA 17326. * * *

3. The authority citation for Part 1 continues to read as follows:

Authority citation: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303; Implement, 5 U.S.C. 552, unless otherwise noted.

4. Section 1.926(a)(1) is amended by revising the first sentence of the paragraph to read as follows:

§ 1.926 Application for renewal of license.

(a) * * *

(1) Renewal of station authorizations in the Private Land Mobile Radio Services (Part 90 of this chapter), the General Mobile Radio Service (Part 95, Subpart A of this chapter), and the Personal Emergency Locator Transmitter Service (Part 95, Subpart F of this chapter) shall be submitted on FCC Form 574-R when the licensee has received that Form in the mail from the Commission. * * *

5. Section 1.951(a)(1) is amended by revising the heading to paragraph (a), adding a paragraph (a)(3), removing paragraph (c) and redesignating paragraph (d) to read as follows:

§ 1.951 How applications are distributed.

* * * * *

(a) Special Services Branch.

(1) * * *

(2) * * *

(3) General Radio Section applications: Amateur, General Mobile, Disaster and Personal Emergency Locator Transmitters.

* * * * *

(c) Microwave Branch. Operational fixed point-to-point and point-to-multipoint applications.

6. Section 1.952(b) is amended by changing CA to ZA and adding a category under the heading Personal Radio Services to read as follows:

§ 1.952 How file numbers are assigned.

(a) * * *

(b) * * *

Personal Radio Services

ZA - General Mobile Radio Service

ZB - Personal Emergency Locator Transmitter Service

* * * * *

7. Section 1.1112 is amended by revising paragraph (b) to read as follows:

§ 1.1112 General exemptions to charges.

* * * * *

(b) Applicants in the Special Emergency Radio, Public Safety Radio, and Personal Emergency Locator Transmitter services.

* * * * *

8. The authority citation for Part 2 continues to read as follows:

Authority citation: Secs. 4, 302, 303, 307, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 302, 303, 307, unless otherwise noted.

9. Section 2.106 is amended by modifying the 220-225 MHz band and adding a footnote US314 as follows:

§ 2.106 Table of Frequency Allocations.

UNITED STATES TABLE		FCC USE DESIGNATORS	
Government Allocation MHz	Non-government Allocations MHz	Rule part(s)	Special-Use Frequencies
(4)	(5)	(6)	(7)
***	***	***	***
220-222 Land Mobile.	220-222 Land Mobile.	PRIVATE LAND MOBILE (90)	
US314	US314	PERSONAL (95)	

* * * * *

US314 The frequency bands 220.9775 - 220.9975 and 221.9775 - 221.9975 MHz are limited to Personal Emergency Locator Transmitter Service operations.

* * * * *

10. The authority citation for Part 95 continues to read as follows:

Authority citation: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303.

11. Section 95.601 is amended by revising the last two sentences of the paragraph to read as follows:

§ 95.601 Basis and purpose.

* * * The Personal Radio Services are the GMRS (General Mobile Radio Service), the R/C (Radio Control Radio Service), the CB (Citizens Band Radio Service), and the PELTS (Personal Emergency Locating Transmitter Radio Service). For operating rules, see Part 95, Subpart A - GMRS; Subpart C - R/C; Subpart D - CB; Subpart F - PELTS.

12. In Section 95.603, paragraph (d) is added to read as follows:

§ 95.603 Type acceptance required.

* * * * *

(d) Each PELTS transmitter (a transmitter that operates or is intended to operate at a station authorized in the PELTS) must be type accepted.

13. Section 95.626 is added to read as follows:

§ 95.626 PELTS transmitter channel frequencies.

(a) The PELTS transmitter channel frequencies are:

Frequency MHZ	Channel Designator	Use
220.9775[1]	1	Assistance/Emergency (Base)
220.9825[1]	2	Assistance/Emergency (Base)
220.9875[2]	3	Information (Base)
220.9925[2]	4	Short-distance (Mobile)
220.9975[2]	5	Short-distance (Mobile)
221.9775[1]	6	Assistance/Emergency (Mobile)
221.9825[1]	7	Assistance/Emergency (Mobile)
221.9875[2]	8	Short-distance (Mobile)
221.9925[2]	9	Short-distance (Mobile)
221.9975[2]	10	Emergency Notification/ Homing (Mobile)

[1] Channels 1 and 2 are paired with Channels 6 and 7 respectively for full duplex operation. Mobile relay (mobile-to-mobile through a base station) operations are not permitted on these frequencies.

[2] Reserved for unpaired simplex communications.

(b) Each PELTS base transmitter must be maintained to within a frequency tolerance of ± 0.0001 per cent, and mobile units must maintained to within a frequency tolerance of ± 0.00015 percent

14. In Section 95.627 paragraphs (d) and (e) are redesignated as (e) and (f) respectively and a new paragraph (d) is added to read as follows:

§ 95.627 Emission types.

* * * * *

(d) For PELTS operations on all channels only emission types J3E or J2D will be authorized.

(e) No GMRS or CB transmitter shall employ a digital modulation or emission.

(f) No GMRS, CB, or R/C transmitter shall transmit non-voice data.

15. In Section 95.629 paragraph (c) is added to read as follows:

§ 95.629 Emission bandwidth.

* * * * *

(c) The maximum authorized bandwidth for any emission type transmitted by a PELTS transmitter is 3.6 kHz.

16. In Section 95.631 the table in paragraph (b) is revised and a new footnote (10) is added to read as follows:

§ 95.631 Unwanted radiation.

* * * * *

(b) * * *

Transmitter	Emission Type	Applicable paragraphs
* * * * *		
PELTS . .	As specified in 95.627(d)	(10)
* * * * *		

(10) For PELTS transmitters that operate in 5 kHz channel assignments in the 220-222 MHz frequency band, the power of any emission shall be attenuated below the power of the highest emission contained within that channel in accordance with the following schedule:

(i) On any frequency removed from the center of the authorized bandwidth by a displacement frequency (f_d in kHz) of more than 1.8 kHz up to and including 2.5 kHz: At least 100 (f_d - 1.8) decibels;

(ii) On any frequency removed from the center of the authorized bandwidth by more than 2.5 kHz up to and including 5 kHz: At least 70 + 4 (f_d -2.5) decibels; and,

(iii) On any frequency removed from the center of the authorized bandwidth by more than 5 kHz: At least 80 decibels.

(iv) Emission power shall be measured in peak values.

(v) The resolution bandwidth of the instrumentation used to measure the emission power is as follows: for measuring emissions up to (and including) 5 kHz from the center of the authorized bandwidth: 100 Hz; and, for measuring emissions more than 5 kHz from the center of the authorized bandwidth: 10 kHz. The power level of the highest emission within the channel, to which the attenuation is referenced, should be remeasured for each change in resolution bandwidth.

17. In Section 95.633 the first sentence of paragraph (b) is revised and a new paragraph (f) is added to read as follows:

§ 95.633 Modulation standards.

* * * * *

(b) Each GMRS and PELTS transmitter, except a GMRS mobile station or a PELTS mobile station transmitter with a power output of 2.5 W or less, must automatically prevent a greater than normal audio level from causing over-modulation. * * *

* * * * *

(f) A PELTS transmitter shall be exempt from the audio low-pass filter requirements of this section, provided that transmitters used for digital emissions must be type accepted with the digital modulating signal or signals specified by the manufacturer. The type acceptance application shall contain such information as may be necessary to demonstrate that the transmitter complies with the emission limitations specified in § 95.631.

18. In Section 95.635 paragraphs (d) and (e) are added to read as follows:

§ 95.635 Maximum transmitter power.

* * * * *

(d) No PELTS base transmitter, under any conditions of modulation, shall exceed 100 watts output power.

(e) No PELTS mobile transmitter, under any conditions of modulation, shall exceed 3 watts of output power.

19. In Section 95.649 paragraph (b) (4) is revised to read as follows:

§ 95.649 Instructions and warnings.

(b) * * *

(4) For a GMRS transmitter and a PELTS base station transmitter, warnings concerning licensing requirements and information concerning license application procedures.

20. A new Section 95.651 is added to read as follows:

§ 95.651 Mobiles in PELTS.

(a) Mobiles in PELTS must have the ability to transmit on all PELTS mobile channels.

(b) Mobiles in PELTS must meet the following requirements:

(1) Have a positive means of turning the equipment off. When an on-off switch is employed a guard must be provided to prevent inadvertent operation.

(2) The exterior of the equipment must have no sharp edges or projections. Means must be provided to fasten the equipment to a person.

(3) Be powered by a battery contained within the transmitter case and be equipped with a visual indication of a low battery condition. The visual indicator must indicate when 75 percent of the battery's useful life has expired.

(4) Have operating instructions understandable by untrained personnel permanently displayed on the outside of the equipment.

(5) Have an attached warning label clearly stating that channel 10 is to be used only for emergency alerting and is effective only in areas where there is a watch/response system in place.

(6) Be waterproof and float free in calm fresh water with at least its upper 10 cm (4 inches) out of the water.

(7) Have a visible or audible indicator that clearly shows that the device is operating. The indicator must be protected from damage due to dropping or contact with other objects.

(8) Meet the requirements of subparagraphs (1) through (7) of this section after free falls onto hard surfaces 3 times from a height of 18 meters (60 feet).

21. A new Subpart F is added to read as follows:

Subpart F - Personal Emergency Locator Transmitter Service (PELTS)

GENERAL PROVISIONS

§ 95.701 Scope

The PELTS is a land mobile radio service available to eligibles and is intended primarily for short-distance personal and emergency communications in isolated areas. The service provides a means of alerting or establishing communications with either other individuals or a point from which emergency assistance can be obtained. The technical parameters for PELTS operation are set forth in Subpart E.

§ 95.703 Definitions.

(a) Mobile station. A station which transmits while moving or during temporary stops at unspecified points.

(b) Base station. A station at a specified site authorized to communicate with mobile stations or mobile receivers.

§ 95.705 Eligibility

Licenses for Personal Emergency Locator transmitter base stations will only be granted to governmental entities or private organizations recognized by governmental entities to perform search and rescue functions. Licenses will not be granted to a foreign government or a representative of a foreign government. Eligibility for PELTS mobile stations will not be limited.

§ 95.707 License requirements.

An entity must obtain a license from the Commission prior to operating a base station in PELTS at any geographic location within or over the territorial limits of any area where radio services are regulated by the FCC. No individual license is required to operate a PELTS mobile station. Mobile use is authorized under the authority of the base station license.

§ 95.709 Channel Sharing

(a) Channels assigned in the PELTS are available only on a shared basis and will not be assigned for the exclusive use of any licensee. All applicants and licensees shall cooperate in the selection and use of channels in order to reduce interference and to make the most effective use of the authorized facilities. (*See* § 95.626 for specific uses of channels.)

(b) Licensees of PELTS stations suffering from or causing harmful interference are expected to cooperate and resolve such problems by mutually satisfactory arrangements. If the licensees are unable to do so, the FCC may impose restrictions including specifying the transmitter power, antenna height, or area or hours of operation of the station concerned. Further, the use of any frequency at a given geographical location may be denied when, in the judgment of the FCC, its use in that location is not in the public interest; the use of any channel may be restricted as to specified geographical areas, maximum power, or other operating conditions.

§ 95.711 Where to contact the FCC.

(a) Write to:

The nearest FCC Field Office:

(1) For license application forms (see § 95.721);

(2) To report interference; or

(3) To find out if the FCC has type-accepted a certain transmitter for use in the PELTS (see 95.651).

(b) Write to:

Federal Communications Commission
Attention: PELTS
Gettysburg, Pennsylvania 17326

(1) To ask questions about a license application or about these Rules;

(2) To file a license application (see 95.721);

(3) To request a duplicate license;

(4) To notify the FCC of a change in name (see § 95.727) or mailing address;

(5) To request consent to a change in the control of a licensee corporation (see 95.731);

(6) To return a license to the FCC for cancellation;

(c) Write to:

Chief, Field Operations Bureau
Federal Communications Commission
Washington, D.C. 20554

To consult with the FCC about putting a land station at a point within 4.8 kilometers (3 miles) of an FCC monitoring station (see § 95.751).

LICENSING

§ 95.721 Application for station license.

(a) An application (FCC Form 574) for a new station license shall be submitted to: Federal Communications Commission, Attention: PELTS, Gettysburg, PA 17326.

(b) The application will be returned to the applicant if it is defective. An application is defective if:

(1) The form is not completely filled out;

(2) All necessary additional information is not included; or

(3) All necessary certifications have not been made.

(c) The Commission may, without a hearing, grant an application in part or subject to terms or conditions or with privileges other than those requested. The applicant will be presumed to have accepted the grant as conditioned unless the applicant files a written rejection of the grant as made within 30 days from the date of the grant or the effective date of the grant, whichever is later. If the Commission receives notice of rejection of such a grant, the Commission will vacate its original action and will set the application for hearing.

§ 95.723 Basic application information.

The following information is required in all applications for a license for a new or modified base station:

(a) Applicant's name;

(b) Applicant's mailing address (an address in the United States where mail from the FCC can be received);

(c) Station class;

(d) Number of base stations and mobile units;

(e) Each base station location;

(1) Latitude and longitude within one second; and

(2) Street address (if none, local directions to station);

(f) Antenna height for each base station, and antenna ground elevation for each base station;

(g) Area of operation;

(h) Applicant's signature (see § 95.755);

(i) Transmitting channels requested;

(j) Transmitter power;

(k) Effective radiated power (ERP);

(l) Emission designator;

(m) Primary control point and telephone number;

(n) Eligibility statement; and

(o) Copy of recognition issued by governmental entity.

§ 95.725 Signature.

(a) If the applicant is an individual, he/she must sign the application.

(b) If the applicant is any other entity, the following individual must sign the application:

If the entity is:	The individual who signs is:
(1) A partnership	A partner;
(2) A corporation	An officer, director, or employee;
(3) An association	An officer;
(4) A governmental unit	An official.

§ 95.727 Modification of license.

When the information about the licensee stated on the license changes, the licensee must take the following step(s):

(a) The following changes require the licensee to file an application (FCC Form 574) for modification of a license. The licensee may not operate under the new parameters until the FCC has approved the license modification.

(1) Change in frequency;

(2) Change in power;

(3) Change in antenna height;

(4) Change in station location;

(5) Change in number of mobile units; or

(6) Change in corporate ownership, control, or corporate structure.

(b) The following changes also require the licensee to notify the Commission. Notification in these cases, however, may be by letter addressed to Federal Communications Commission, Attention: PELTS, Gettysburg, Pennsylvania 17326. The letter must clearly specify the name and mailing address as they appear on the license, the station call sign(s), and the new name or mailing address. A copy of the letter sent to the Commission must be kept with the station records.

(1) Change in mailing address; or

(2) Change in name only of the licensee without changes in ownership, control or corporate structure.

(c) The licensee must keep the license document until:

(1) The license expires; or

(2) The license is terminated by the FCC; or

(3) The licensee obtains a different license for the PELTS system.

§ 95.729 Discontinuance of station operation.

If a station license is no longer desired, it must be sent to the Federal Communications Commission, Attention: PELTS, Gettysburg, Pennsylvania 17326 with a written request that it be cancelled. Alternatively, the licensee may notify the Commission of discontinuance of station operation by using FCC Forms 405-A or 574-R.

§ 95.731 License term.

A license for a base station is usually issued for a 5-year term. (FCC prints the expiration date on the license.)

§ 95.733 Transfer or assignment of license.

(a) The licensee must not transfer, assign, sell or give the license for a base station to any other entity except if the licensee of a base station is a corporation, and there is a change in the control of the corporation with prior Commission approval. The licensee must request consent for the change of control from the FCC on FCC Form 703. The FCC document granting such consent must be kept with the station records.

(b) If the licensee sells or gives away the station equipment, the new owner must obtain a new license before using it, unless the new owner uses the equipment in an already licensed PELTS base station.

§ 95.735 License renewal.

(a) The licensee of a base station may apply to the FCC to renew the license for another term by filling out FCC Form 574-R (or FCC 405-A when the licensee has not received FCC Form 574-R within 30 days of the expiration of the license) and sending it to the Federal Communications Commission, Attention: PELTS, Gettysburg, PA 17326, providing that the license has not expired and that any changes are limited to the mailing address and/or the name (see § 95.729).

(b) If the license renewal application is sent to the FCC before the existing license term expires, the renewal application is timely filed and the base station may continue to operate under the expired license until the FCC acts on the license renewal application. (A copy of the license renewal application sent to the FCC must be kept with the station records until the renewed license, or notification of other FCC action, is received.)

SPECIAL RESTRICTIONS ON LOCATION AND ANTENNA HEIGHT

§ 95.741 Operation near FCC monitoring stations.

The FCC may impose additional restrictions on a PELTS base station if it is located within 4.8 kilometers (3 miles) of an FCC monitoring station and the station's transmissions degrade, obstruct or repeatedly interrupt the operation of the monitoring station. Before applying for a license to operate a base station at such a location, or before applying to modify operation of a station already licensed for such a location, the FCC should be consulted by writing to Chief, Field Operations Bureau, Federal Communications Commission, Washington, D.C. 20554.

§ 95.743 Operation in the National Quiet Zone.

(a) If any applicant seeks to operate in the National Quiet Zone (as defined below) notice must be sent to:

Director, National Radio
Astronomy Observatory

P.O.Box 2
Green Bank, West Virginia 24944

of intent to file with the FCC an application for a license for a new or modified base station located within the National Quiet Zone. The National Quiet Zone is an area within the States of Maryland, Virginia, and West Virginia, which is bounded by:

(1) 39^0 15' N. on the North;
(2) 78^0 30' W. on the East;
(3) 37^0 30' N. on the South; and
(4) 80^0 30' W. on the West.

(b) Provide the following details about the proposed station in the notice:

(1) Antenna point (latitude and longitude);
(2) Antenna height;
(3) Antenna directivity;
(4) Transmitting channel(s);
(5) Emission; and
(6) Transmitter output.

(c) Include in the application to the FCC the date the notice was sent to the Observatory.

§ 95.745 Operation on environmentally or historically important land.

An application for new or modified license that may have a significant effect on the environment as defined in § 1.1307 must be accompanied by an Environmental Assessment. (*See* § 1.1311.) For environmental requirements with regard to construction prior to Commission authorization. (*See* § 1.1312.)

§ 95.747 Operation near the Canadian border.

The United States and the Government of Canada coordinate channel assignments to certain radio stations in areas along their common borders north of Line A and east of Line C. (*See* § 1.955 of the FCC Rules.)

§ 95.749 Authorized area of operation.

You are authorized to operate your PELTS station from:

(a) Within or over any area of the world where radio services are regulated by the FCC. Those areas are within the territorial limits of:

(1) The fifty United States.
(2) The District of Columbia.

Caribbean Insular areas

(3) Commonwealth of Puerto Rico.
(4) Navassa Island.
(5) United States Virgin Islands (50 islets and cays).

Pacific Insular areas

(6) American Samoa (seven islands).
(7) Baker Island.
(8) Commonwealth of Northern Mariana Islands.
(9) Guam Island.
(10) Howland Island.
(11) Jarvis Island.
(12) Johnston Island (Islets East, Johnston, North and Sand).
(13) Kingman Reef.
(14) Midway Island (Islets Eastern and Sand).
(15) Palmyra Island (more than 50 islets).
(16) Wake Island (Islets Peale, Wake and Wilkes).

(b) Any other area of the world, except within the territorial limits of areas where radio services are regulated by --

(1) An agency of the United States other than the FCC.
(2) Any foreign government.

(c) An aircraft or ship, with the permission of the captain, within or over any area of the world where radio services are regulated by the FCC or upon or over international waters. You must operate your station according to any applicable treaty to which the United States is a party.

§ 95.751 Antenna height considerations.

(a) A base station antenna (the station's radiating structure (for transmitting, receiving or both), including the tower, mast or pole supporting it and everything attached to the structure) must not be a hazard to aircraft. The licensee of a base station must obtain FCC permission (see § 95.753) before the uppermost tip of an antenna may be higher than permitted by paragraphs (b), (c) and (d) of this section.

(b) Regardless of any other requirement of this section, an antenna may always be at least:

(1) 6.1 meters (20 feet) above the ground or above the building or tree upon which the antenna is mounted; or
(2) Equal to the height of an existing antenna to which the base station antenna is attached.

(c) The antenna may be as high as 61 meters (200 feet) above the ground, unless it will be within 6.1 kilometers (20,000 feet) of an airport or heliport.

(d) If the antenna is near an airport or heliport listed in the FAA's (Federal Aviation Administration's) Airport Facilities Directory, or near an airport or heliport operated by the Department of Defense, it must not be higher than:

(1) One meter higher than the airport elevation for every 100 meters from the nearest runway if the runway is longer than one kilometer (3,281 feet), and is within 6.1 kilometers (20,000 feet) of the antenna; or

(2) Two meters higher than the airport elevation for every 100 meters from the nearest runway if the runway is no longer than one kilometer (3,281 feet), and is within 3.1 kilometers (10,000 feet) of the antenna; or

(3) Four meters higher than the heliport elevation for every 100 meters from the nearest landing pad if the pad is within 1.5 kilometers (5,000 feet) of the antenna.

(e) If the FCC grants permission to put an antenna higher than normally allowed in paragraphs (b), (c), and (d) of this section, the licensee may be required to mark the antenna with bright paint and light it up at night (see Part 17 of the FCC Rules).

§ 95.753 Additional information for stations with antennas higher than normally allowed.

(a) An applicant for a license for a new or modified base station seeking permission to have an antenna higher than normally allowed (see § 95.751) must:

(1) Request on FCC Form 574 an antenna height greater than normally allowed; and

(2) Notify the Federal Aviation Administration on FAA Form 7460-1 that the antenna would be higher than normally allowed.

§ 95.755 Servicing station transmitters.

(a) The station licensee shall be responsible for the proper operation of the station at all times and is expected to provide for observations, servicing and maintenance as often as may be necessary to ensure proper operation. All adjustments or tests during or coincident with the installation, servicing, or maintenance of the station should be performed by or under the immediate supervision and responsiblity of a person certified as technically qualified to perform transmitter installation, operation, maintenance, and repair duties in the private land mobile services and fixed services by an organization or committee representative of users in those services.

(b) Except as provided in paragraph (c) of this section, test signals during internal adjustments to a station transmitter must be made using a non-radiating simulated antenna.

(c) Brief test signals using a radiating antenna may be transmitted to adjust the antenna to the station transmitter or to detect or measure spurious radiation. These test transmissions must not be longer than one minute during any five-minute period. These test transmissions shall not interfere with communications already in progress on the operating frequency, and shall be properly identified as required, but may be otherwise unmodulated as appropriate.

OPERATOR REQUIREMENTS

§ 95.761 General licensee duties.

(a) The licensee is responsible for the proper operation of the station at all times.

(b) The licensee must have access to the station equipment and be able to disable it.

§ 95.763 Permissible communications.

(a) Channels 1, 2, 6, and 7 are limited to emergency assistance voice communications involving safety of life and property.

(b) Channel 3 is limited to one-way non-commercial informational voice messages pertaining, but not limited to, such information as weather conditions, hazards, closings, rest stops, and location of first-aid stations or other assistance.

(c) Channels 4, 5, 8, and 9 are limited to short distance personal voice communications.

(d) Channel 10 is limited to non-voice emergency alerting/homing transmissions.

(e) Priority must be given to emergency communications. Communications not pertinent to constructive handling of the emergency situation is prohibited.

(f) PELTS stations are not authorized to communicate:

(1) Messages in connection with any activity that is against Federal, state or local law;

(2) False or deceptive messages;

(3) Intentional interference;

(4) Music, whistling, sound effects, or other transmissions to amuse, entertain, or attract attention;

(5) Obscene, profane, or indecent language;

(6) Advertisements or offers for the sale of goods or services.

§ 95.765 Station identification.

(a) Every PELTS base station must transmit a station identification:

(1) Following the transmission of communications or a series of communications; and

(2) Every 15 minutes during a long transmission.

(b) The station identification is the call sign assigned to the base station;

(c) A unit number may be included after the call sign in the identification.

(d) The station identification must be clearly transmitted by voice in the English language, with each letter and digit separately and distinctly transmitted (letters may be said using a phonetic alphabet. *See*, International Telecommunications Union Radio Regulations, Appendix 24).

§ 95.767 Station records.

(a) The licensee must keep records for the base station during the license term (see § 95.729), except that the licensee need not keep authorizations which have expired.

(b) Records include the following documents (where applicable):

(1) A copy of the current license document;

(2) Copies of letters from the licensee to the FCC concerning name or mailing address changes (see § 95.727);

(3) Copies of answers to discrepancy notices;

(4) A grant of Special Temporary Authority (STA) or waiver of these rules;

(5) A copy of any renewal application submitted to the FCC and not yet acted upon (see § 95.733);

(6) A copy of the FCC consent to a licensee corporation's change in its corporate control (see § 95.731).

§ 95.769 Station inspection.

If an authorized FCC representative wishes to inspect any station or station records, the licensee or station operator must make the station available for inspection.

TRANSMITTER CONTROL

§ 95.771 Station control point.

(a) Each base station must have a control point where the station operator can communicate messages and control the station by:

(1) Causing it to transmit and to cease transmitting;

(2) Taking all necessary and reasonable precautions to assure that unauthorized or improper operations do not occur;

(3) Refraining from making any transmissions that may have the reasonably anticipated effect of causing improper operation of others' equipment; and

(4) In cases of recurrent interference, obeying any Commission-imposed additional requirements or restrictions designed to mitigate such interference.

(b) The control point for each station must be at that station, unless the license authorizes the station to be controlled from a remote point.

§ 95.773 Controlling a station from a remote point.

(a) A station operator may control a base station from a remote point through a control link (a connection between the remote control point and the remotely controlled station). The control link must be either:

(1) A wireline control link solely for purposes of transmitter control for messages which are both conveyed by a wireline control link and transmitted by a base station; or

(2) A radio control link.

(b) The remotely controlled station must not make unauthorized transmissions.

(c) The station operator must perform the required duties (see 95.761) when controlling the station from a remote point in the same manner as when controlling it locally at the station point. Should the control link fail to function so that the station operator cannot perform the required duties, the remotely controlled station must not transmit.

(d) The FCC does not consider a station as being remotely controlled if the connection is a wireline or mechanical control link, and the station and its control point are both:

(1) On the same vehicle; or

(2) At the same street address, or within 152 meters (500 feet) of each other.

(e) Any device used to establish a wireline control link which is attached to the public switched telephone network must be registered with the FCC and must comply with the standards incorporated in a registration program to protect the public switched telephone network from harm (see Part 68 of the FCC Rules).

§ 95.775 Interconnection.

No station in the PELTS may be interconnected to the public switched telephone network. Wireline or radio circuits or links furnished by common carriers, which are used by licensees or other authorized persons for transmitter control (including dial-up transmitter control circuits) or as an integral part of an authorized private internal system of communication are not considered to be interconnected for purposes of this section.

FOOTNOTES

[1] For example, the National Sporting Goods Association reports that participation by individuals over age 7 in skiing, backpacking, mountain climbing, and hunting increased from 48.3 million to 55.6 million for the period of 1984 to 1988, *Sports Participation 1988*.

[2] For the National Park Service, for example, the number of search and rescue incidents increased twofold, from 1500 to 2900, between 1978 and 1988. According to The Interagency Committee on Search and Rescue (ICSAR), "[t]his only gives a glimpse into the extent of the concern since no one has an accurate picture of the problem." *Final Report of ICSAR Ad Hoc Study Group on Personal Locating Beacons*, (ICSAR Final Report), January 17, 1989, p 3.

[3] *New York Times*, May 16, 1986, 1.

[4] *The Washington Post*, February 21, 1987, A7.

[5] The exception is Class "C" EPIRBs which operate on the maritime VHF frequencies 156.750 and 156.800 MHz.

[6] *See Report and Order*, PR Docket No. 86-424, 3 FCC Rcd 5406 (1988).

[7] SARSAT stands for search and rescue satellite-aided tracking. COSPAS is an acronym for a Russian phrase meaning space system for search and distressed vessels.

[8] The cost of tracking and silencing false alarms for ELTs alone was estimated to exceed $2 million a year. *Smithsonian*, March 1987, 142. On September 27, 1988, *The Christian Science Monitor*, reporting the launch of the National Oceanic and Atmospheric Administration's (NOAA) new NOAA-11 satellite for use in an international satellite search and rescue program for ships and aircraft, noted that between $900 and $3,000 per hour is spent for fuel during a rescue operation. The *Christian Science Monitor*, September 27, 1988, 4.

[9] Public Notice, "Commission Warns Against the Intentional Misuse of Emergency Locator Transmitters," December 29, 1988.

[10] ICSAR is chaired by the U.S. Coast Guard and composed of other federal government agencies with an interest in search and rescue matters. ICSAR is the federal administrator of the National Search and Rescue Plan.

[11] *See* ICSAR Final Report, *supra*, 1.

[12] *See*, for example, *Report and Order*, Docket No. 19693, 39 Fed. Reg. 10143 (1974). (Special Requirements for Class A EPIRB)

[13] For example, the Mount Hood Locator Unit is a homing system utilizing a small radio transmitter. The RECCO Detector, an avalanche victim locating device, is a detection system that passively and constantly monitors users. It consist of a transponder with a foil aerial and diode which receives a 917 MHz signal from the detector.

[14] Satellite and rural cellular telephone communications offer some future possibilities in this area. For example, Geostar Corporation, which has been allocated spectrum and licensed in the radiodetermination satellite service, has received a patent on a vehicle location system using satellite technology that when implemented, will be able to pinpoint a customer's location within two to seven meters. This system is being geared for the consumer market. These two systems may not, however, be available for the purpose of emergency communications with hand-held portable units in remote areas for some time, especially in the case of rural cellular telephone systems. We invite comments on the potential of commerical satellite systems or rural cellular systems to meet the needs identified here quickly and at a reasonable cost.

[15] *See* ICSAR Final Report, *supra*, 2.

[16] *See* ICSAR Final Report, *supra*, 6.

[17] There are currently three Personal Radio Services, the Citizens Band (CB) Radio Service, the General Mobile Radio Service (GMRS) and the Remote Control (R/C) Radio Service.

[18] A letter of recognition from a governmental entity would accompany an application, and inform the Commission that the governmental entity recognizes the private organization as providing *bona fide* search and rescue services.

[19] Mobile units would be authorized to operate on all mobile channels allotted to PELTS.

[20] *See Report and Order*, PR Docket No. 82-799, 48 Fed. Reg. 24884 (1983).

[21] Recognizing that the high costs for licensing individual stations in the R/C and CB Radio Services may not justify the limited public interest benefits of such licensing, Congress amended the Communications Act of 1934 to permit us to grant authority to operate R/C and CB radio stations without individual licenses. *See* Public Law (P.L.) 97-259, Section 113(a), enacted September 13, 1982. *See also* 47 U.S.C. § 307(e).

[22] *See* para 30, *infra*. We also ask for comments on whether we should limit users to reduce interference (*i.e.*, license one provider per area). *See* paragraph 30.

[23] This is consistent with the current policy under the Communications Act of 1934, as amended, of exempting safety related radio services. *See* 47 C.F.R. § 1.1112(b).

[24] *See* ICSAR Final Report, *supra*, 3.

[25] Mr. Seymour's proposed use of the 72-76 MHz band was opposed by the AMA.

[26] *See Notice of Proposed Rule Making*, PR Docket 89-552.

[27] The lower half of these five frequency pairs (220-221 MHz), the base transmit side, is immediately adjacent to the upper half (221-222 MHz), which is reserved for mobile transmitting (base station receiving) in the private land mobile radio services. Consequently, there is the potential for interference from PELTS base station operations to private land mobile stations operating (receiving) on frequencies near 221 MHz and located in close proximity to a PELTS base station. Because PELTS base stations will be located primarily in remote areas, this should not be a problem. Nevertheless, we request comments on this matter.

[28] We emphasize again that PELTS is intended only to provide the communications capability needed. It is up to the governmental and private entities to provide the other half of the equation, watch and response systems, necessary to make this work. As the watch and response systems are provided a network of base stations will gradually build thereby increasing the efficiency and effectiveness of the PELTS.

[29] *See Report and Order*, Gen. Docket No. 87-14, 3 FCC Rcd 5287 (1988).

[30] *See* note 26, *supra*.

[31] *See* 47 C.F.R. § 1.955.

[32] *Report and Order*, Gen Docket No. 87-112, 3 FCC Rcd 905 (1987).

[33] *See* 47 C.F.R. § 87.261(c).

[34] *See* note 26, *supra*.

[35] For example, should a temperature range for mobile devices be specified, should an automatic identification be included in the transmission of the mobile device, should channel 10 have a separate switch to allow communication on other working channels while mobile device transmits a locating signal, and should we require a copy of the PELTS rules to be packaged with the equipment? We request commenters to provide specific values where appropriate.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 89-553

In the Matter of

Amendment of Parts 2 and 90
of the Commission's Rules
to Provide for the
Use of 200 Channels Outside the
Designated Filing Areas in the
896-901 MHz and 935-940 MHz
Bands Allotted to the
Specialized Mobile Radio Pool

Modification of FCC Rule Section 90.627(b) Governing Multiple Sites for Specialized Mobile Radio Service Systems In Rural Markets — RM-6724

NOTICE OF PROPOSED RULE MAKING

Adopted: November 28, 1989; Released: December 18, 1989

By the Commission:

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I. INTRODUCTION

1. We are initiating this proceeding to propose amendments to Parts 2 and 90 of the Commission's Rules[1] to facilitate more flexible use of the 200 channels allocated to the Specialized Mobile Radio (SMR)[2] pool in the 896-901/935-940 MHz (900 MHz) bands. Specifically, we propose to allow the 900 MHz band outside the Designated Filing Area (DFAs) [3] to be used for mobile and fixed operation on a primary basis under certain circumstances, to assign national[4] licenses, to allow a ten-year construction period for systems built under national licenses, to establish a national license term of ten years, to eliminate the application of the 40 mile rule under certain circumstances, to clarify when a national license may be assigned, and to impose specific application standards for national and multiple or single site licenses.

II. BACKGROUND

2. On September 26, 1986, we released a *Report and Order* in General Docket 84-1233[5] in which we allocated ten megahertz of spectrum in the 900 MHz band to the private land mobile radio services (PLMRS). We allocated this spectrum to the PLMRS because we concluded that without such allocation there would be "serious spectrum shortfalls for the private land mobile services in the near future, especially in the nation's major urban centers."[6] We then apportioned the ten megahertz of spectrum allocated to the PLMRS among four service pools.[7] The SMR pool was allotted five of the ten megahertz.[8] Although the allotment of the five megahertz to the SMR pool was nationwide, we directed that applications for these channels would be accepted initially only in 50 designated urban centers that most needed additional communications capacity.[9] We stated that, once the channels had been assigned in these 50 markets, we would consider the use of these channels in other areas in another rule making.[10]

3. In the Public Notice of November 4, 1986,[11] we delineated the application procedures for the 900 MHz spectrum allocated to the PLMRS. We divided the ap-

plication processing for the designated 50 urban centers into two phases.[12] In the first phase (Phase I), DFAs were identified and an applicant wishing to build an SMR station within a DFA was permitted to apply for a license. The Commission received more applications than channels available in each of the 46 DFAs and held lotteries to select licensees in each DFA. Six DFAs remain unlicensed because they are located either within 100 miles of the Canadian border or within 68.4 miles of the Mexican border.[13] Three DFAs are awaiting the completion of licensing in nearby DFAs.[14] In the remaining DFAs, either all available licenses have been granted or the applications for grants are being processed. We anticipate that Phase I licensing will be completed, except for the border cities, within eight to twelve months.

4. The second phase of licensing (Phase II) was to begin upon completion of Phase I. Phase II would also be based on a market-by-market approach. An applicant would apply for a license to construct an SMR station within a 100-mile radius of the geographic center of each of the 50 urban centers, but would have to afford at least a 70 mile separation between its base station and the primary base station[15] of any Phase I co-channel licensee.[16] As discussed below, we now question whether this procedure would be the most efficient way to assign this five megahertz of spectrum.

5. A thorough review of our licensing records for 800 MHz SMR stations has revealed that a large number of existing SMR stations are outside the 46 DFAs and, of these, a significant number are located outside the 100-mile radius of the designated 50 urban centers. This raises questions as to the best approach for subsequent 900 MHz SMR assignments and whether the implementation of Phase II as originally conceived would adversely affect the development of the 900 MHz SMR market by artificially constraining the location of systems outside the DFAs. We are proposing, therefore, to eliminate Phase II and begin immediately to license 900 MHz channels in all areas, both inside and outside the DFAs.

6. Aside from exploring alternatives to the Phase II policies, modifications to other SMR assignment rules would increase licensee flexibility. For example, we currently license each SMR base station individually for local use.[17] Several SMR operators have expressed the desire to construct multiple site systems[18] that provide coverage to a wide area. In some cases, the operators are in rural areas and are providing service to sparsely populated areas. Under our rules, the operators are precluded from having two primary trunked base stations within 40 miles of each other (40 mile rule)[19] even though they may wish to provide service to a larger area than could be served by one base station. Construction of a secondary site is risky, however, because the secondary station may be forced to terminate operations if a co-channel licensee should locate a station within 70 miles of the secondary site. These operators have suggested that we eliminate the 40 mile rule and allow a licensee to obtain grants for all its stations for a particular region under one license.[20]

7. In addition, entities currently are developing systems that provide wide area or national coverage.[21] Development of such systems, however, can be burdensome and time consuming under our rules. The licensee must submit numerous individual station applications, ensuring not to violate the 40 mile rule, negotiate with other licensees to manage their stations, buy time at other stations for use by its customers, or seek a waiver of our rules. There is no assurance during this process that the same set of frequencies will be available at each of the licensee's selected sites. As the SMR service currently has no compatibility or interoperability standards or requirements, the licensee may find that without a uniform set of frequencies the cost of integrating different sets of frequencies into its system makes developing the system impractical or impossible. Except for the Motorola system, the licensees proposing these systems have sought waivers of the Commission's rules to implement the systems. The service to be provided by the system has been delayed pending Commission action. We, therefore, propose amendment to Part 90 to facilitate wide area service by eliminating the need for waivers of the rules to implement systems that give wide area coverage. We also propose to reserve several blocks of ten channels each for systems proposing nationwide service.

III. ASNA PETITION FOR RULE MAKING

8. ASNA has filed a petition with the Commission that raises issues similar to those involved in licensing of wide area systems discussed above. *See* paras. 6 and 7, *supra*. ASNA has petitioned for an exemption for 800 MHz SMR rural operators from the 40-mile rule to enable these operators to construct multiple sites within a 40-mile service area and to split their authorized channels among the sites. It proposes that a licensee designate a primary site to determine its 40-mile service area.[22] Once licensed, the operator could then modify its license to construct all or portions of its authorized channels at additional sites within the 40-mile service area. Each base transmitter site would be granted "primary" status and would be afforded interference protection from future co-channel licensees.[23]

9. Further, ASNA's proposal would allow the licensee to apply for an additional five channels pursuant to Section 90.631(d) of our Rules[24] once its first five channels were constructed. The additional channels could then be constructed at any of the previously constructed sites, or the license could be modified to add additional sites. Under ASNA's proposal, loading would be determined by the total number of mobiles on the system rather than by the number of mobiles per individual station. Only licensees with stations in areas defined as rural[25] would be permitted to construct multiple stations and split their authorized channels.

10. The comments received in response to ASNA's proposal were generally favorable to it.[26] AAR, although agreeing that the flexibility allowed under the proposed rule change would be desirable, characterized ASNA's proposal in its entirety as "spectrally wasteful." AAR requests that limits be placed on the number of exclusive frequency assignments that could be granted a rural SMR licensee. NABER also supports ASNA's proposal, but is concerned that ASNA's proposal, without clarification, could lead to abuses by some operators. NABER, therefore, suggests that the Commission prohibit "satellite" stations of rural systems from being built within urbanized areas,[27] that the rule change not be extended to 900 MHz SMR systems, and that an 800 MHz SMR licensee be limited to a total of ten channels within any 40 mile area, unless applicable loading standards have been met.

11. In its reply comments, ASNA agrees with NABER's recommendation that rural systems not be allowed to expand into wait list areas, but does not agree that any modifications to its proposal are necessary to prevent

rural SMR operators from obtaining additional channels regardless of need. ASNA contends that the current rules and marketplace forces will prevent SMR operators from building networks of unloaded systems. Moreover, ASNA points out that prohibiting a licensee from having more than ten unloaded channels in any 40 mile area would be an administrative burden on the Commission without any corresponding benefits. ASNA also clarifies that its proposed rule change is not intended to apply to the 900 MHz SMR band until after completion of licensing under Phase I and Phase II.

12. The record developed by the ASNA petition as well as our recent experience demonstrates a significant need for wide area private land mobile systems. We have found this to be particularly true in rural areas where business activities are less concentrated and licensees require extended coverage areas to increase the number of potential customers. Increasing the number of potential customers helps justify the high cost of constructing a trunked SMR system. We believe that the public interest is served by facilitating the development of wide area rural systems within the context of our rules instead of forcing licensees to jump through regulatory hoops to achieve the systems they require. We therefore will examine modifications to our 40 mile rule in order to provide rural SMRs greater coverage areas in both the 800 MHz and 900 MHz bands. Again, the industry has shown us by their actions that nationwide systems are needed and should be accommodated within our Rules. We therefore will explore the development of nationwide 900 MHz systems.

IV. DISCUSSION

13. Our overriding objective in establishing assignment procedures for 900 MHz SMRs is to facilitate provision of mobile communication service to areas that need it. Based on our review of 800 MHz SMR assignments and our experience with 900 MHz, it seems as though this objective can be satisfied best by consolidating all further 900 MHz assignments into a single process. This will enable applicants to identify the areas they wish to serve without being limited to areas within 100 mile circles of the top 50 markets. For example, we have a waiting list for 800 MHz SMR channels in Las Vegas, Nevada, a city that is not within 100 miles of a top 50 market. Under our original procedures, Las Vegas would not be able to obtain 900 MHz channels until after completion of Phase II. We think that the public interest would be better served by structuring our procedures to allow entrepreneurs as much flexibility as possible to locate their systems to meet market demands. This should assure that systems are authorized first in areas of greatest need.

14. To continue limits on station location, without an offsetting public benefit, would be inconsistent with our objective to promote SMR growth. In order to foster further SMR growth, we believe that the SMR operators should be authorized greater flexibility and fewer regulatory constraints so that they may use the spectrum in a manner that reflects demand. Accordingly, we are proposing the following changes to the Rules to introduce this flexibility rather than continuing licensing under the previously issued Phase II procedures. We are requesting comments, however, on the desirability of continuing with the current Phase II approach.

A. National and Rural Multiple Site Licenses

(1) Background

15. Wide area service seems to be a service the public demands. One indication is the numerous wide area networks that we identified in the 800 MHz SMR band.[28] Other indications are the development of nationwide systems in the 800 MHz and 900 MHz bands (see paragraph 7, *supra)* and ASNA's proposal to exempt 800 MHz rural operators from the 40 mile rule (see paragraph 8, *supra).* Another indication is the existence of wide area systems constructed under other land mobile services authorizations by large corporations and public utilities. There may well be other businesses that have similar communications needs but do not have the financial ability to construct their own systems. These businesses could benefit from wide area or nationwide SMR service.

16. We believe that authorizing SMR licensees the use of frequencies for multiple station systems providing coverage to wide areas, either nationally or regionally, would increase spectrum efficiency, provide better quality service to end users, and allow service to reach potential end users that may otherwise be without adequate communication options. Wide area licensing should promote further improvements in spectrum-efficient technologies by providing incentives to SMR operators to develop systems for end users with substantial land mobile requirements, but without the resources to construct their own systems. Wide area licensing would grant the high degree of flexibility, both geographically and operationally, necessary to construct such systems.

17. Grant of a license to use a single set of frequencies within a designated coverage area, in our view, would be the most efficient and least burdensome method to achieve the desired results. Such grants would reduce the resources the Commission would have to dedicate to processing numerous applications and would decrease the number of lottery proceedings the Commission would have to handle. Accordingly, we propose to facilitate the construction of wide area systems by setting aside a number of frequencies specifically for national networks in the 900 MHz SMR band and permitting multiple site SMR systems to be licensed in both the 800 MHz and 900 MHz SMR bands.

(2) National License

18. *Selection and assignment of frequencies.* We propose to set aside specific blocks of channels for national licensing.[29] We propose that each block of channels consist of ten contiguous 900 MHz frequencies.[30] We propose that six blocks of channels be set aside for national licensing.[31] This would result in 60 of the available 200 channel pairs being designated for nationwide systems. Commenters should address the need for national licenses and whether the number of channel blocks set aside for national licensing is sufficient or excessive.

19. *Compatibility.* Our purpose in proposing to designate specific frequencies for national licensing is to promote construction of nationwide compatible SMR systems similar to the nationwide networks proposed by American Mobile Data Communications, Inc. and Millicom Radio Telephone Company, Inc.[32] The availability of a compatible nationwide network would provide end users with an option not generally available to end users of an 800 MHz SMR system. We propose to require

each national licensee to construct all base stations and design all mobile or portable units to assure compatible operation on its frequencies. Additionally, we propose to allow each national licensee to identify the parameters and protocols to standardize the base station/ mobile unit interface. We invite specific comment on the desirability of nationwide compatible systems, the technical and economic effects of a compatibility requirement on the licensees and end users, and whether the parameters and protocols to standardize base station/mobile unit interface should be defined by each national licensee or should be standardized by the Commission for all national systems.

20. *Number of base stations*. To be eligible to receive a national license, we propose that applicants indicate an intent to construct nationwide. We propose to require that an applicant for a national license certify that it will construct and have in operation at least one base station in at least 50 of the urban centers listed in Appendix B. We do not propose to require that all ten channels assigned a national licensee be constructed at one base station within an urban center. We do propose, however, that at least three assigned channels be constructed and operational at a base station within the urban center to be counted towards the construction benchmarks. We seek comments on whether the proposed fifty base station minimum is adequate to demonstrate and ensure efficient and effective use of the spectrum and whether a sufficient number of urban centers have been listed to permit national licensees to meet our requirement. Commenters also are invited to propose alternate definitions of a national system.

21. The national licensee must protect any constructed co-channel system that obtained its authorization in Phase I. Some frequencies, however, may be taken back by the Commission from Phase I licensees for non-construction or failure to load. If any of the channels set aside for national licensing should be taken back in the Phase I DFAs, we propose to authorize automatically the national licensee for those channels to construct in the market vacated. The national licensee, however, would have to file an application to modify its license prior to actual construction and operation within the vacated market.

22. *Forty - mile rule*. We propose to exempt national licensees from the 40-mile rule. A national licensee might, in some areas, construct base stations within 40 miles of each other to provide "seamless coverage" to its system's users.[33] Because the frequencies would be given to national licensees to use as they deem best, to prohibit any national licensee from building separate stations within 40 miles of each other using its national frequencies would be inconsistent with the reasons for establishing national licenses. We request comments on our proposal to exempt the national licensees from the 40-mile rule.

(3) Rural Multiple Site License

23. The national license is proposed to provide for nationwide compatible SMR offerings. Additionally, we want to allow non-nationwide licensees flexibility to develop quality service to specific markets and to create regional SMR systems. Modification of the 40 mile rule would allow SMR operators additional flexibility to provide optimum service to the markets they serve. Rural SMR operators have found it nearly impossible to achieve the requisite loading that would enable them to construct a second, coordinated SMR system to meet their wide area coverage needs. In addressing this issue, we find that ASNA's petition for modification of the 40-mile rule as it affects 800 MHz SMR rural operators[34] is pertinent, and we incorporate it into this rule making.

24. ASNA's proposal would not eliminate the 40-mile rule but would merely modify it and add a definition of "trunked system" as used in Section 90.627(b) of our Rules.[35] Although many SMR operators may wish to have the 40-mile rule completely eliminated, complete elimination of the 40-mile rule could lead to one entity obtaining all or most available SMR channels within an area and perhaps creating a "wait list" situation when demand does not warrant it. Elimination of the 40-mile rule, therefore, could encourage speculators to apply for SMR frequencies and encourage hoarding and warehousing of SMR frequencies. Consequently, we do not propose to eliminate the 40-mile rule. Rather, we propose to modify it similar to the manner suggested by ASNA. Although ASNA did not intend for its proposal to apply to the 900 MHz SMR channels, the proposal can also be applied to 900 MHz SMR systems and would enable us to keep our rules consistent as they pertain to 800 MHz and 900 MHz SMR systems.

25. NABER and AAR are concerned that licensees could create overlapping unloaded systems that could also adversely affect the amount of spectrum available to other applicants. NABER suggests that a licensee be limited to ten channels within a 40-mile area unless loading levels per channel justify additional channels. We agree that an applicant, if not somehow restricted in the number of channels it obtains to serve a particular market, could initially obtain a large number of channels that could remain unloaded for a number of years to the exclusion of other applicants. Consequently, in order to prevent hoarding and warehousing, we would restrict the number of unloaded channels that a licensee may have in any one market area. We believe, however, that these restrictions, set forth in paragraphs 27 and 28 below, are sufficiently flexible to allow a licensee to operate several contiguous systems.

26. The other point of contention raised by NABER is the possibility that under ASNA's proposal a rural operator could construct its additional base stations in an urban area or wait list area.[36] The rural operator would then have base stations where spectrum is at a premium, but would not be required to meet the same rigorous loading standards as other licensees licensed directly within those areas. We agree that rural operators, if allowed to split their channels among multiple sites, should not be allowed to expand their system into urban/wait list areas. Nor would we propose to allow a non-nationwide licensee of a system located within an urban/wait list area to construct a multiple site system as proposed by ASNA.[37]

27. Accordingly, we propose to modify the 40-mile rule to permit licensees of rural systems using 800 MHz and 900 MHz SMR frequencies to have multiple, unloaded base stations within 40 miles of each other with certain limitations. All sites composing the proposed multiple site system must be located outside any urban or wait list area as defined by Section 90.631(d) of our Rules.[38] An applicant seeking a system with multiple sites and proposing to split its channels among the sites must file an application[39] indicating the coordinates for all proposed antenna sites. The applicant must specify one of its proposed base stations as its "primary" site.[40] All additional sites comprising the system must be within a 40-mile radius of the applicant's designated primary site. The primary site and

its additional sites will be licensed under one call sign.[41] The primary site and each additional site will be granted 70-mile interference protection for only those channels actually constructed at each site.

28. We propose that no more than ten different channels be licensed to one entity within a 40-mile radius of its designated primary site until sufficient loading of the system has occurred to permit additional channels to be assigned to the system.[42] We propose that no one site would need to have all the channels assigned to the system constructed at it. If the 40-mile radii of two or more systems licensed to the same entity overlap, we propose that no more than ten different channels could be constructed within such overlap area unless sufficient loading has been achieved on one or more systems to permit additional channels. To determine system loading, the total number of mobile units and control stations operating in a system shall be counted with respect to the total number of base station frequencies assigned to the system.

29. We request comments on our proposals to modify the 40-mile rule, to create applicant-defined markets of 40-mile radii from a specific point, and to limit the number of unloaded channels a licensee has within its defined markets.

B. Conditions of License

(1) Fixed Use

30. Our Rules currently allow a 900 MHz SMR operator great flexibility in developing and operating its system. SMR operators may use their systems for all Part 90 mobile operations.[43] The 900 MHz SMR operator also is permitted the flexibility to select its mode of operation, either trunked or any other comparably efficient mode of operation, as well as to combine channels to create bandwidths greater than 12.5 kHz to accommodate non-voice transmissions.[44] Except for control stations, fixed operations generally are not authorized in the 900 MHz band; secondary fixed ancillary signaling and data transmission, however, are authorized on trunked systems.[45] The SMR operator is allowed to offer a variety of services to its customers, but it still may be prevented from serving the customer's entire needs because of its inability to provide fixed services on a primary basis.[46]

31. In view of our proposal to allow national licenses and to modify the 40-mile rule, we believe that greater operational flexibility should also be allowed. A rigid regulatory process is unable to adjust to the altering demands for the spectrum's use or to reallocate the spectrum in a timely manner to prevent shortfalls. Therefore, we propose to allow SMR operators to provide both mobile and fixed operations, each on a primary basis, on their systems at sites located outside a 100-mile radius of the geographic centers of the 46 DFAs.[47] Allowing SMR channels to be used for fixed operations in these areas should not affect the availability of channels for land mobile systems because there is ample spectrum in rural areas. API's petition, however, highlights a shortage of frequencies in these areas for fixed operations.

32. We do not propose any new technical parameters or interference criteria. The licensee would have to abide by the technical parameters and interference criteria currently found in Part 90 of our Rules.[48] It would be up to the licensee to construct its stations and control its mobiles to prevent interference with its other stations[49] and to afford protection from interference to all existing co-channel licensees.

33. Accordingly, we propose to amend Part 2 to provide for both mobile and fixed use in the 896-901/935-940 MHz bands and Part 90 to permit the SMR channels to be used for both mobile and fixed operations if the base station is located outside a 100-mile radius of the geographic center of any of the 46 DFAs. Persons eligible for licensing under Subpart S[50] could apply for 900 MHz SMR frequencies set aside for multiple site/single site systems for multiple address systems and point-to-point operations as long as they can demonstrate that such use would not interfere with any co-channel or adjacent channel land mobile system.[51] Licensing for these fixed operations stations would not begin until 36 months after the first multiple site/single site license has been granted. Commenters should address the ability of 900 MHz SMR licensees to the use fixed and mobile operations, both on a primary basis, on their systems outside a 100-mile radius of any of the 46 DFAs, without any changes to the interference criteria currently in effect.

(2) Construction Period

34. *Rural multiple site systems.* Under our existing rules, trunked systems must be constructed and operational within one year of the license grant.[52] We do not propose to amend the one year construction requirement for multiple site systems. All channels within a multiple site system must be constructed and in permanent operation within one year from the date the license was issued. If the license is modified to relocate an antenna site or add an antenna site during the one year construction period, such stations must then be constructed within the original one year period.

35. We propose, however, to require that stations relocated or added to a system after the first year of the license term to be constructed within one year of the date the modification of the license was granted. The continued construction requirement is necessary because each licensed channel would receive primary interference protection at any site at which it is constructed and operational. A licensee could obtain extensive interference protection for all its channels by licensing every channel at every site without actual construction unless a continued construction requirement is implemented.

36. We seek comments on our proposal to maintain a one year construction requirement for multiple site systems rather than to allow a slow growth implementation schedule. Commenters favoring a slow growth license for multiple site systems should suggest a length of time that should be granted to complete construction and the showing necessary to obtain a slow growth license.

37. *National systems.* A one year construction requirement, however, might deter development of national networks. A substantial investment will be required to develop and construct such systems. Consequently, we propose a ten year license term[53] and a ten year construction period with periodic benchmarks that national licensees must meet in order to retain their licenses.

38. We propose to require national licensees to have at least ten (10) percent of their proposed base stations constructed within two years, at least forty (40) percent of their proposed base stations constructed within four years, at least seventy (70) percent of their proposed base sta-

tions constructed within six years, and all of their proposed base stations constructed within ten years of licensing.[54] A national licensee who successfully constructs all proposed base stations within the first ten year period could apply for renewel of its national license for another ten year term[55] and, if granted renewal, would continue to have exclusive use of the assigned frequencies nationwide. If, however, a national licensee should fail to meet any of the required construction benchmarks, we propose a complete forfeiture of the use of the national frequencies.[56] Our goal is the construction and operation of nationwide compatible SMR service. Allowing a national licensee continued use of channels reserved for national service for a partially constructed system could defeat that goal. Upon the cancellation of a national license due to failure to construct, a new national licensee would be selected. The constructed base stations could not continue to operate on the national frequencies unless they were compatible with, and part of, the new national licensee's system.[57]

39. We invite comments on our proposal to grant slow growth licenses to national licensees. Specifically, we request comments on the validity and usefulness of the construction benchmarks and penalties,[58] the increase of the license term for national licenses as opposed to other 900 MHz SMR licenses, and the ability of a national licensee to retain exclusive use of its frequencies nationwide after completion of its proposed construction and renewal of its license.

40. *Clarification of Construction Requirements*. We also take this opportunity to clarify our construction requirements. We have received reports that some licensees believe they have complied with our requirement by installing a "base station on wheels" on the day construction is required and then removing the station. Our Rules require that stations be in operation, not merely constructed. To clarify the point, we propose to modify Sections 90.155 and 90.631(e) and (f) of our Rules[59] to indicate that stations, both for national and non-national licensees, must be in continuous operation after the required construction date. Periods of inoperation for 30 days or more will subject the license to cancellation unless a longer period is specifically authorized by the Commission. We seek comments on whether this proposal would serve the public interest.

(3) Loading standards

41. *National systems*. Section 90.631(b) of our Rules[60] currently provides that a licensee must meet a minimum loading level on its system within five years of its initial license grant[61] or risk losing assigned channels. Our current rules also will discontinue channel take backs for failure to load after June 1, 1993.[62] As the national licensee has ten years to construct, application of a five year loading period would be inconsistent with our proposal. Moreover, a licensee who has invested substantial financial resources into its national system will have an economic incentive to load the system sufficiently to earn a reasonable return on its investment. Accordingly, we propose that loading standards for take back purposes not apply to national licensees. We invite comments our our proposal to exempt national licensees from the loading standards for take back purposes.

42. Licensees of trunked systems located in urban/wait list areas[63] seeking to expand a trunked system under our current rules[64] must have a loading level of 70 mobiles per channel on their existing systems that are subject to the expansion requests. Generally, SMR systems have all assigned channels constructed at one site. The loading level of these systems may be determined by dividing the number of mobiles licensed to the system by the number of channels authorized. For expansion purposes, we also propose that the loading level of nationwide systems also be determined by this method on a site-by-site basis. Thus, for a nationwide licensee to obtain additional channels at a particular site, it must demonstrate that all ten channels constructed at that site are loaded to 70 mobiles per channel. We observe, however, that to promote the use of the spectrum in the rural areas, nationwide licensees should be granted as much flexibility as possible to use the spectrum in the manner in which the demand is the greatest. We seek comments on our proposal to limit expansion of nationwide systems to a site- by-site basis.

43. Likewise, as discussed in paragraphs 28, *supra*, and 45, *infra*, for the expansion of rural multiple site systems we propose to determine the loading level of the system by geographic areas rather than specific sites. We invite comment on whether our rural expansion proposal should also apply to nationwide licensees at rural locations.

44. We also ask for comment on whether we should apply our normal loading rules to nationwide and nonnationwide licensees outside major urban areas. Our current loading standards for system expansion may not take into consideration the flexibility we are attempting to give licensees to make more efficient use of the spectrum outside urban areas. Mobile stations, as defined in Section 90.631(a) of our Rules,[65] include only vehicular and portable mobile units and control stations. Remote stations and other fixed units would not be considered for loading purposes, although the spectrum would be in use. Moreover, our proposals herein will authorize licensees to conduct fixed operations on a primary basis. It must also be recognized that to promote more intensive use of spectrum in the rural areas licensees may be required to promote dispatch and interconnect mobile service. With all these options available, merely counting mobile units may not actually reflect how intensely the spectrum is being used and whether additional channels are needed. We therefore ask whether another measure of spectrum use should be applied in determining whether a licensee can apply for additional channels to expand its existing system.

45. *Rural multiple site systems and local systems*. We propose to exempt only nationwide systems from the application of the take back rule found in Section 90.631(b).[66] Additionally, we do not propose to change the loading standards for urban/wait list area systems.[67] We do propose, however, to clarify the rule relating to loading standards as they apply to the expansion of rural systems.[68] Section 90.631(d) of our Rules[69] currently reflects merely a construction requirement to obtain additional channels for a rural system. The rule is inconsistent with our intent and with our discussion in our *Report and Order*, Docket No. 86-404[70] and our *Memorandum Opinion and Order*, Docket No. 86-404.[71] SMR trunked systems would not be authorized, under our proposal, more than ten unloaded channels at one time.[72]

46. We request comment on our proposal to amend § 90.631(d) to reflect our intent that no system be authorized more than ten unloaded channels and that the current loading standard for system expansion be retained.

(4) Assignment of Frequencies

47. Preventing a national licensee from transferring authorizations until it has completed construction of its entire system, or for ten years, whichever is first, may not be efficient or practical. It could prevent the spectrum from being used by entrepreneurs who wish to tie into the national system in areas in which the national licensee may not intend to construct. On the other hand, permitting assignment or transfer of nationwide frequencies without restrictions could encourage speculators to apply for the frequencies.

48. As it is our intent to promote nationwide compatible SMR service, we propose to allow a national licensee to transfer portions of its authorizations to a third party if the third party's system would continue to be compatible with the transferring national licensee's system. In that way, if the national license should be cancelled for failure to construct, a second-generation national licensee would not be impeded from successfully implementing nationwide service. The transferred stations, although compatible with the national system, would not be considered part of the national system for construction purposes. The national licensee still would be required to construct in the required number of urban centers and to meet the construction benchmarks regardless of the stations transferred.

49. We further propose to restrict the transfer of any portion of the national authorization, whether a station is constructed or not, until four years from the date of the license grant.[73] This time restriction should discourage speculators from applying for nationwide authorizations. A national licensee who has met the four year construction benchmark[74] would be considered to have shown sufficient good faith intent to construct a nationwide system.

50. Additionally, we propose to permit a national licensee to sublease or franchise base stations to other parties[75] under arrangements similar to the system management agreement concept.[76] In the case of a sublet or franchise, no transfer or assignment of the license would be considered to have occurred. The Commission, however, would have to be notified of the existence and identity of any sublessee or franchisee.[77] The national licensee would remain responsible for the operation of the station as well as for the station's adherence to our rules and regulations. Base stations constructed under such sublease or franchise agreements would be considered part of the national system and would be counted toward the national licensee's minimum base station requirement.

51. Commenters should address whether a national licensee should be permitted to assign or transfer constructed base stations before completion of its system and whether a national licensee ever should be allowed to transfer for-profit authorizations for unconstructed stations.[78] Additionally, we request comments on whether national licensees should be allowed to sublease or franchise stations to third parties and, if so, whether the requirements should differ from the standards set for system management contracts.

C. Application Processing

52. Background. In Phase I we did not require applicants to complete the entire Form 574. In essence, the application was similar to a lottery ticket. Filing windows for the various markets were opened, and all applicants were put on notice that selection would be by lottery if the number of applications filed for a particular DFA exceeded the number of licenses that could be granted for that DFA. The procedure allowed the initial applications to be processed quickly without a need to devote disproportionate Commission resources that would have been required to process these applications under normal procedures. We believe, however, that a majority of Phase I applications were filed by speculators.[79] We would like to prevent speculators from filing for this additional spectrum so that the spectrum is put to use as quickly as possible.

53. *National license entry criteria.* For national licenses, we propose to require some assurance that licensees have the economic and technical resources to follow through on their proposals. We propose that national applicants certify that they have communications experience pointing to their capability to construct the systems they propose and that they have assets in excess of 50 million dollars. If they cannot make this financial certification, they must demonstrate that they have a firm financial commitment for financing to construct and operate the system for ten years.[80] Requiring applicants to satisfy at least one of these financial requirements should minimize the filing of speculative applications. The real party in interest issues[81] should be reduced as well by the implementation of these requirements. Additionally, we propose to require a national licensee to submit a ten-year construction schedule explaining the proposed system in detail.[82]

54. We request comments on the proposed entry requirements for national licensees. We are particularly interested in comments on whether the proposed financial showing will prove too burdensome and exclude entities that are capable of constructing nationwide systems. We also seek comments on whether requiring applicants to certify to communications experience would be anti-competitive and exclude entities that are financially capable of constructing nationwide systems. Commenters favoring the communications experience requirement should comment on what type of communications experience should be required. Finally, we solicit recommendations of other ways that we might deter speculators from filing for national licenses.

55. *Application fee.* We propose to require an applicant applying for either a national or a multiple site system license to submit an application fee for each base station specified in its application or construction schedule. For example, an applicant for a national license proposing a system with 100 base stations would pay a filing fee of $3,000.00 ($30.00 multiplied by 100 base stations) with its initial application.[83] The fee would be required to file an application even if a lottery will be conducted. The fee would not be returned, regardless of the outcome of the lottery.

56. *Procedures.* Consistent with our present policies, applications would be granted on a first come/first served basis. Applicants would be able to file for frequencies outside the DFAs as well as for frequencies then available within the DFAs. Reclaimed Phase I frequencies would be classified the same as the frequencies outside the DFAs.[84] We propose to prohibit applicants for national licenses to apply initially for any other 900 MHz SMR license or to

submit more than one application for a national license. Any violations of the above proscriptions would result in dismissal of all applications submitted by an applicant.

57. We propose that applications filed on the same day and requesting more frequencies than are available be subject to a lottery procedure pursuant to Section 1.972.[85] We do not propose to afford any preference to Phase I licensees should their application be entered into a lottery. Additionally, we propose to require 900 MHz SMR applicants for rural multiple site systems or for local systems to request specific channel blocks. We propose, however, that applicants for national licenses not be permitted to specify specific channel blocks in their applications. Consistent with our current rules,[86] all applicants would be required to provide antenna site location and technical information for each base station. We propose to require that all proposed base stations either afford 70-mile interference protection to all Phase I primary base stations or include short-space agreements with existing co-channel licensees.[87]

58. We invite comments on these proposed application procedures, including the use of a first come/first served process rather than filing windows.

59. *Waiting lists.* Currently, applications for SMR systems that cannot be granted due to a lack of available channels in a particular area are placed on a waiting list for that area.[88] The waiting lists, once initiated, may consist of two groups. The first group would be comprised of applications from existing licensees who, in the area corresponding to the particular waiting list, operate SMR systems with 70 or more mobile units per channel. The second group would be comprised of applications to establish new SMR systems. We propose to establish a separate waiting list for national applications. Those national applications that cannot be granted would be placed on a separate waiting list.

60. On the other hand, we propose that the non-nationwide trunked system applications be handled pursuant to 47 C.F.R. § 90.611(d). An application for a multiple site system would be granted if the primary site can be approved.[89] Otherwise, it would be placed on a wait list pursuant to Section 90.611(d).[90]

61. Commenters should address whether waiting lists will be practicable once frequencies are no longer taken back for lack of loading during the license term.

V. CONCLUSION

62. We believe that it is in the public interest to allow SMR operators greater flexibility to create spectrally efficient systems that meet end user needs. We seek comments on the proposals contained herein and on the rules proposed in Appendix A and will consider alternatives that are consistent with our goals of providing for more effective use of the spectrum and satisfying the expanding communication needs of end users.

VI. INITIAL REGULATORY FLEXIBILITY ANALYSIS

A. Reason for Action

63. The Commission is proposing these changes to Parts 2 and 90 of the Commission's Rules to facilitate a more flexible use of the 200 channels allocated to the SMR pool in the 900 MHz band. The amended rules will allow licensees more flexibility, both geographically and operationally, to provide spectrally efficient systems and thus reduce the demand for additional spectrum by SMR users.

B. Legal Basis

64. The legal basis for these rule changes is found in Sections 4(i), 303(g), 303(r) and 331(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(g), 303(r), and 332(a).

C. Reporting, recordkeeping, and other compliance requirements

65. Licensees will be required to certify that they have communications experience demonstrating their capability to construct national systems. They must also demonstrate that they have assets in excess of 50 million dollars or that they have a firm financial commitment for financing to construct and operate the proposed systems for ten years.

D. Federal rules which overlap, duplicate, or conflict with this rule

66. None.

E. Description, potential impact, and number of small entities involved

67. Many small entities could be positively affected by this proposal because additional communications options would be made available to them. The number of small entities that will be affected is unknown. Additionally, expanded service opportunities will generate a demand for new communications equipment, a benefit for equipment manufacturers.

F. Any significant alternatives minimizing the impact on small entities and consistent with the stated objectives

68. All significant alternatives have been addressed in this Notice of Proposed Rule Making.

VII. PAPERWORK REDUCTION ACT STATEMENT

69. The proposals contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and contain new or modified form, information collection and/or recordkeeping, labeling, disclosure or record retention requirements, and may increase burden hours imposed on the public. Implementation of new or modified requirements will be subject to approval by the Office of Management and Budget as prescribed by the Act. The benefit will be that entities capable of and wanting to construct communications systems for use by the public would be selected rather than speculators who would hold the licenses and allow the spectrum to lie fallow awaiting the highest bidder. The increase in Commission resources to process applications, therefore, would not be as great because fewer applications should be submitted.

VIII. PROCEDURAL MATTERS

70. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda periods. *See generally* 47 C.F.R. § 1.1206.(a). The Sunshine Agenda period is the period of time which commences with the release of a

public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. 47 C.F.R. § 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. 47 C.F.R. § 1.1203.

71. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2) if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. 47 C.F.R. § 1.1202(b). Any person who makes or submits a written *ex parte* presentation shall provide on the same day it is submitted two copies of same under separate cover to the Commission's Secretary for inclusion in the public record. The presentation (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding to which it relates and the fact that two copies of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation.

72. Any person who in making an oral *ex parte* presentation presents data or arguments not already reflected in that person's written comments, memoranda, or other previous filings in that proceeding shall provide on the day of the oral presentation an original and one copy of a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. The memorandum (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding and the fact that an original and one copy of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation. 47 C.F.R. §1.1206.

73. Authority for issuance of the *Notice of Proposed Rule Making* is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r). Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **February 26, 1990,** and reply comments on or before **March 28, 1990.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

A. 47 C.F.R. Part 2 is proposed to be amended as follows:

1. The authority citation for Part 2 continues to read as follows:

Authority: Sections 4, 302, 303, 307, 48 Stat. 1066, 1082, as amended; 47 U.S. C. 154, 302, 303, , unless otherwise noted.

2. 47 C.F.R. § 2.106 is amended by revising the table as follows:

§ 2. 106 Table of Frequency Allocations

* * * * *

International table		United States table	FCC use designators	
* * *	Government	Non-Government	Rule part(s)	Special-use frequencies
		* * * * *		
* * *		896-901 LAND MOBILE FIXED US116 US268	PRIVATE LAND MOBILE (90)	
		* * * * *		
		935-940 LAND MOBILE FIXED US116 US268	PRIVATE LAND MOBILE (90)	
		* * * * *		

B. 47 C.F.R. Part 90 is proposed to be amended as follows:

1. The authority citation for Part 90 is revised to read as follows:

Authority: 47 U.S.C. 154, 303.

2. 47 C.F.R. § 90.149 is amended by revising paragraph (a) and adding new paragraph (c) to read as follows:

§ 90.149 License term.

(a) Except as indicated in paragraph (c) below, licenses for stations authorized under this part will be issued for a term not to exceed five years from the date of the original issuance, modification or renewal.

(b)* * *

(c) Nationwide authorizations under Subpart S will be issued for a term not to exceed ten years from the date of the original issuance, modification or renewal. *See* §§ 90.607(d) and 617(e).

3. 47 C.F.R. § 90.155 is amended by revising paragraph (a) to read as follows:

§ 90.155 Time in which station must be placed in operation.

(a) All stations authorized under this part, except as provided in paragraph (b) and in §§ 90.629 and 90.631(e), (f) and (g), must be placed in operation within 8 months from the date of grant or the authorization cancels automatically and must be returned to the Commission.

* * * * *

4. 47 C.F.R. § 90.607 is amended by revising paragraph (c) introductroy text, by adding new paragraph (d) and redesignating existing paragraphs (d) and (e) as new paragraphs (e) and (f), respectively:

§ 90. 607 Supplemental information to be furnished by applicants for facilities under this subpart.

* * * * *

(c) Applicants for non-nationwide trunked systems must:

(1)* * *

(2)* * *

(d) Applicants for nationwide systems must:

(1) Furnish a list of all radio systems licensed to them or managed by them.

(2) Furnish a description of the proposed nationwide system, including the locations of all base stations of which at least one base station must be located in at least 50 of the urban centers set forth in Appendix B to the Report and Order in PR Docket No. _____ printed in the FEDERAL REGISTER, of _____, 199__, together with technical details including antenna height (AAT), effective radiated power (ERP), the proposed area of coverage, the signaling methods to be employed, and the proposed protocols and parameters to standardize the system's base station/mobile unit interface.

(3) Certify that they will meet the construction benchmarks set forth in § 90.631(g) and submit a ten-year schedule detailing plans for construction of the proposed system;

(4) Demonstrate that they have communications experience indicative of the capability to construct the proposed system; and

(5) Demonstrate that they have sufficient financial resources to construct the proposed system, *i.e.*, assets in excess of 50 million dollars or a firm financial commitment to support construction and operation of the system for the duration of the initial term of license. The firm financial commitment shall be obtained from a state or federally chartered bank or savings and loan institution, other recognized financial institution, or the financial arm of a capital equipment supplier and shall contain a statement that the lender:

(i) Has examined the financial condition of the applicant including where applicable, audited financial statements, and has determined that the applicant is creditworthy;

(ii) Has examined the financial viability of the proposed system for which the applicant intends to use the commitment; and

(iii) Is willing to provide a sum to the applicant sufficient to cover the realistic and prudent estimated costs of construction and operation of the system for the initial term of license; and

(iv) Is willing to enter into a commitment solely on the basis of the lender's relationship with the applicant.

* * * * *

5. 47 C.F.R. § 90.609 is amended by revising paragraph (a) introductory text, paragraph (b) introductory text and paragraph (c) and by adding paragraph (d) to read as follows:

§ 90. 609 Special limitations on amendment of applications for assignmentor transfer of authorizations for radio systems used to provide service to persons other than the licensee.

(a) No application for a non-nationwide conventional or trunked radio system may be amended so as to substitute a new entity except in the following circumstances: * * *

(b) A license to operate a non-nationwide conventional or trunked radio system may not be assigned or transferred prior to the completion of construction of the facility. However, the Commission may give its consent to the assignment or transfer of control of such a license prior to the completion of construction where: * * *

(c) Licensees of non-nationwide, constructed trunked radio systems are permitted to make partial assignments of an authorized grant to an applicant proposing to create a new system or to an existing licensee that has 70 mobiles per constructed channel for each additional channel to be assigned and is expanding that system. An applicant au-

thorized to expand an existing system or to create a new system with channels it obtains through partial assignment will receive the assignor's existing license expiration date and loading deadline. A licensee that makes a partial assignment will not be authorized to obtain additional channels for that same system for a period of one year from the date of the partial assignment.

(d) A national licensee may assign or transfer constructed stations licensed as part of its nationwide authorization four years from the date of its initial license grant and upon demonstrating that it has constructed at least 40% of its proposed system pursuant to the provisions of § 90.631(g). Constructed stations assigned or transferred must retain the standardized protocol and parameters of the nationwide system. The assignee or transferee is not subject to the financial requirements described in § 90.607(d)(3).

6. 47 C.F.R. § 90.611 is amended by revising paragraph (d), by adding new paragraph (e), and by redesignating existing paragraphs (e) and (f) as new paragraphs (f) and (g), respectively, to read as follows:

§ 90. 611 Processing of applications.

* * * * *

(d) Applications for channels in the SMR category that cannot be granted, except as provided for by paragraph (e), due to a lack of available channels in a particular area will be placed on a waiting list for that area. * * *

(e) Applications for nationwide frequencies that cannot be granted due to a lack of available channels will be placed on a waiting list according to filing date, with the earliest date receiving highest ranking. When channels become available the highest ranking application(s) will be granted.

* * * * *

7. 47 C.F.R. § 90.617 is amended by adding paragraph (e) to read as follows:

§ 90. 617 Frequencies in the 809. 750 - 816 / 854. 750 - 861 MHz, 821 - 824 / 866 - 869 MHz, and 896-901/ 935-940 MHz bands available for trunked or conventional system use in non-border areas.

* * * * *

(e) Channels __-__, __-__, __-__, __-__, __-__, and __-__, listed in Table 4B, are the ten-channel blocks available to eligible applicants for nationwide compatible SMR systems. The availability of these channels in border areas is subject to the provisions of § 90.619.

8. 47 C.F.R. § 90.621 is amended by revising paragraph (a) to read as follows:

§ 90.621 Selection and assignment of frequencies.

(a) Applications in the Public Safety/Special Emergency, Industrial/Land Transportation, and Business categories and for frequencies in the conventional category must specify the frequencies on which the proposed system will operate pursuant to a recommendation by the applicable frequency coordinator. Applicants for nationwide SMRS frequencies in the 896-901/935-940 MHz bands may not request specific frequencies. The Commission will select the specific ten channel block of frequency pairs for the nationwide system. Applicants for non-nationwide SMRS frequencies in the 896-901/935-940 MHz bands must request specific frequencies, including in their applications justification for the frequencies requested. Applicants for SMRS frequencies in the 806-821/821-866 MHz bands may either request specific frequencies by including in their applications justification for the frequencies requested or may request the Commission to select frequencies for the system.

* * * * *

9. 47 C.F.R. § 90.627 is amended by revising paragraph (b) and adding new paragraph (c) to read as follows:

§ 90. 627 Limitation on the number of frequency pairs that may be assignable for trunked systems and on the number of trunked systems.

* * * * *

(b) No licensee will be authorized an additional trunked system within 40 miles of an existing trunked system, except as provided in paragraph (c) of this section and subparagraphs (1), (2), (3) and (4) of this paragraph:

(1)* * *

(4) The licensee holds a nationwide authorization for the frequencies to be constructed at sites within 40 miles of each other.

(c) A non-nationwide trunked system outside urbanized or wait list areas as defined in § 90.631(d) may be authorized multiple sites and be permitted to split authorized channels among the authorized sites. The applicant must designate one of the multiple sites requested as its primary site. All additional sites associated with the designated primary site must be within a 40-mile radius of the designated primary site. No more than ten channels will be authorized a licensee within a 40-mile radius of its primary site, except as permitted by § 90.631(c) and (d). No more than ten channels may be constructed within an area in which an overlap of 40-mile radii occur between two or more system's primary sites licensed to the same entity, except as permitted under the provisions of § 90.631(c) and (d). No licensee will be authorized a primary site of a non-nationwide trunked system within 40 miles of an existing primary site unless the existing system is loaded to at least 70 mobiles per channel.

10. 47 C.F.R. § 90.631 is amended by revising the first sentence of paragraph (a), (b), (d), (e), and (f), adding new paragraph (g), and redesignating existing paragraphs (g) and (h) as new paragraphs (h) and (i), respectively, to read as follows:

§ 90. 631 Trunked system loading, construction and authorization requirements.

(a) Trunked systems, excluding nationwide SMR systems, will be authorized on the basis of a loading criterion of 100 mobile stations per channel. * * *

(b) Each applicant for a trunked system, excluding nationwide SMR systems, shall certify that a minimum of 70 mobiles for each channel authorized will be placed in operation within five years of the initial license grant.* * *

(c)* * *

(d) In rural areas, a licensee of a trunked system, excluding nationwide SMR systems, may request to increase its system capacity by five more channels than it has constructed without meeting the loading requirements specified in paragraphs (b) and (c) of this section, except that the existing system subject to the expansion request must have a loading level of 70 mobiles per channel for five channels if authorized more than five but less than eleven channels, or a loading level of 70 mobiles per channels for ten channels if authorized more than ten but less than sixteen channels, or a loading level of 70 mobiles per channel if authorized more than fifteen but less than twenty-one channels. An existing system with twenty or more authorized channels must meet the loading requirements specified in paragraph (c) of this section to increase it system capacity by applying for additional channels. The loading level of a rural multiple site system is determined by dividing the total number of mobiles stations licensed to the system by the number of authorized channels.

(e) Except as provided in paragraph (g) of this section and § 90.629, licensees of trunked facilities must complete construction of all authorized base stations at the authorized sites within one year of the initial license grant or within one year of the modification approval if the approval was received after one year of the initial license grant. If the facilities are not constructed, the license cancels automatically and must be returned to the Commission.

(f) If a station is not placed in permanent operation according to the technical parameters authorized by the license within one year, except as provided in paragraph (g) of this section and § 90.629, its license cancels automatically and must be returned to the Commission. Permanent operation is defined for purposes of this section to be continuous operation with no period of inoperation exceeding thirty (30) days.

(g) Licensees granted nationwide authorizations will be required to construct base stations in the markets designated in the application as follows:

(1) In at least 10% of the markets designated within two years of licensing, in at least 40% of the markets designated within four years, in at least 70% of the markets designated within six years, and in all designated markets within ten years of licensing.

(2) Licensees not meeting the criteria set forth in paragraph (1) of this section shall lose the entire authorization, but will be permitted to convert the constructed base stations to non-nationwide channels, if such channels are available. The constructed base stations are not authorized to operate on the nationwide frequencies upon cancellation of the license and pending relicensing.

(3) Progress reports will be filed within 30 days of the conclusion of each of the periods set forth in paragraph (1) of this section to inform the Commission of the status of the system.

* * * * *

11. 47 C.F.R. § 90.637 is amended by revising paragraphs (a) and (c) and adding new paragraph (d) to read as follows:

§90. 637 Restrictions on operational fixed stations.

(a) Except for control stations, operational fixed operations will not be authorized in the 806-824 MHz and 851-869 MHz bands and on the non-SMRS frequencies in the 896-901 MHz and 935-940 MHz bands. In these bands, this does not preclude secondary fixed tone signaling and alarm operations authorized in § 90.235 or in paragraph (c) of this section. Operational fixed operations are authorized on SMRS frequencies in the 896-901 MHz and 935-940 MHz bands, except in areas within a 100-mile radius of the urban centers listed in § 90.631(d) and subject to the technical parameters and interference criteria in §§ 90.235 and 90.621(b) and paragraph (c) of this section.

(b)* * *

(c) Trunked SMR licensees and licensed end users in the 806-824 MHz and 851-869 MHz bands * * *

(d) Trunked SMR licensees and licensed end users in the 896-901 MHz and 935-940 MHz bands may use the system for fixed signaling and data transmissions. All such fixed use is subject to the following requirements.

(1) The output power shall not exceed 30 watts at the remote site.

(2) Any fixed transmitters will not count toward meeting the mobile loading requirements nor be considered in whole or in part as a justification for authorizing additional frequencies in the licensee's mobile system.

(3) Automatic means shall be provided to deactivate the remote transmitter in the event the carrier remains on for period in excess of three minutes.

(4) Operational fixed stations authorized pursuant to the provisions of this paragraph are exempt from the requirements of §§ 90.425 and 90.429.

APPENDIX B

Urban centers in which base stations may be located to meet the requirement of a nationwide system.

Albany, NY
Albuquerque, NM
Allentown-Bethlehem, PA-NJ
Amarillo, TX
Anaheim-Santa Ana, CA
Anchorage, AK
Ann Arbor, MI
Appleton-Oshkosh-Neenah, WI
Atlanta, GA
Atlantic City, NJ
Augusta, GA
Aurora-Elgin, IL
Austin, TX
Bakersfield, CA
Baltimore, MD
Baton Rouge, LA
Beaumont-Port Arthur, TX
Beaver County, PA
Billings, MT
Biloxi-Gulfport, MS
Binghamton, NY
Birmingham, AL
Boise City, ID
Boston, MA
Boulder-Longmont, CO
Brazoria, TX
Bridgeport-Stamford-Norwalk-Danbury,CT
Brownsville-Harlingen, TX
Buffalo, NY
Burlington, VT
Canton, OH
Casper, WY
Charleston, SC
Charleston, WV
Charlotte, NC
Chattanooga, TN
Chicago, IL
Cincinnati, OH
Cleveland, OH
Colorado Springs, CO
Columbia, SC
Columbus, GA-AL
Columbus, OH
Corpus Christi, TX
Lancaster, PA
Lansing-East Lansing, MI
Los Angeles, CA
Las Vegas, NV
Lexington, KY
Lincoln, NE
Little Rock-North Little Rock, AR
Lorain-Elyria, OH
Louisville, KY
Lubbock, TX
Macon-Warner-Robins, GA
Madison, WI
Manchester-Nashau, NH
McAllen-Edinburg-Mission, TX
Melbourne-Titusville-Palm Bay, FL
Memphis, TN-AR-MS
Dallas-Ft. Worth, TX
Davenport, IA-Rock Island, IL
Dayton, OH
Daytona Beach, FL
Denver, CO
Des Moines, IA
Detroit, MI
Duluth, MN-WI
El Paso, TX
Erie, PA
Eugene-Springfield, OR
Evansville, IN-KY
Fargo, ND-Moorhead, MN
Fayetteville, NC
Flint, MI
Fort Collins-Loveland, CO
Fort Myers-Cape Coral, FL
Fort Pierce, FL
Fort Wayne, IN
Fresno, CA
Gainesville, FL
Grand Rapids, MI
Greensboro, NC
Greenville-Spartanburg, SC
Harrisburg-Lebanon-Carlisle, PA
Hartford, CT
Hickory, NC
Honolulu, HI
Houma-Thibodaux, LA
Houston, TX
Huntington-Ashland, WV-KY-OH
Huntsville, AL
Indianapolis, IN
Jackson, MS
Jacksonville, FL
Johnson City-Kingsport-Bristol, TN-VA
Johnstown, PA
Joliet, IL
Kalamazoo, MI
Kansas City, MO-KS
Killeen-Temple, TX
Knoxville, TN
Lafayette, LA
Lake County, IL
Richmond-Petersburg, VA
Roanoke, VA
Rochester, NY
Rockford, IL
Saginaw-Bay City-Midland, MI
Salem, OR
Salinas-Seaside-Monterey, CA
Salt Lake City, UT
San Antonio, TX
San Diego, CA
San Francisco, CA
Santa Rosa-Petaluma, CA
Sarasota, FL
Savannah, GA
Scranton-Wilkes-Barre, PA
Seattle, WA
Miami, FL
Milwaukee, WI
Minneapolis-St. Paul, MN
Mobile, AL
Modesto, CA
Monmouth-Ocean, NJ
Montgomery, AL
Napa County, CA
Nashville, TN
New Haven-Waterbury-Meriden, CT
New London-Norwich, CT
New Orleans, LA
New York, NY
Norfolk-Virginia Beach, VA
Oklahoma City, OK
Omaha, NE-IA
Orlando, FL
Pensacola, FL
Peoria, IL
Philadelphia, PA
Phoenix, AZ
Pittsburgh, PA
Portland, ME
Portland, OR
Portsmouth-Dover-Rochester, NH
Poughkeepsie, NY
Providence, RI
Provo-Orem, UT
Raleigh-Durham, NC
Reading, PA
Reno, NV
Shreveport, LA
Sioux Falls, SD
South Bend-Mishawaka, IN
Spokane, WA
Springfield, MA
Springfield, MO
St. Louis, MO
Stockton, CA
Suffolk County, NY
Tacoma, WA
Tallahassee, FL
Tampa-St. Petersburg-Clearwater, FL
Toledo, OH
Trenton, NJ
Tucson, AZ
Tulsa, OK
Utica-Rome, NY
Visalia-Tulare-Porterville, CA
Washington, D.C.
West Palm Beach-Boca Raton-Delray Beach, FL
Wichita, KS
Wilmington, DE-NJ-MD
Worchester-Fitchburg-Leominster, MA
York, PA
Youngstown-Warren, OH

FOOTNOTES

[1] 47 C.F.R. Parts 2 and 90.

[2] The SMR service is a radio service in which licensees provide land mobile communications services in the 800 MHz and 900 MHz bands on a commercial basis to entities eligible to be licensed under 47 C.F.R. Part 90, federal government entities, and individuals. 47 C.F.R. § 90.7.

[3] *See* Public Notice, Private Land Mobile Application Procedures for Spectrum in the 896-901 MHz and 935-940 MHz Bands, 1 FCC Rcd 543 (1986)(Public Notice of November 4, 1986). Generally, a DFA includes the counties composing a Metropolitan Statistical Area as defined by the Census Bureau. The Commission established 46 DFAs for the initial phase of licensing SMRs on these 900 MHz channels (Phase I) and accepted applications only for systems that would be constructed within DFA boundaries.

[4] Such licenses will not be true "national" licenses because the frequencies that we propose to reserve for nationwide systems have been assigned in some of the DFAs.

[5] Report and Order, Amendment of Parts 2, 15, and 90 of the Commission's Rules and Regulations to Allocate Frequencies in the 900 MHz Reserve Band for Private Land Mobile Use, 2 FCC Rcd 1825 (1986).

[6] *Id.* at 1828-1830.

[7] *Id.* at 1830-1832.

[8] We established a 12.5 kHz channeling plan for these five megahertz. *Id.* at 1832-1835. Accordingly, 200 paired channels were allotted to the SMR pool.

[9] The actual areas surrounding the designated urban centers for which applications would be accepted were delineated by the Public Notice of November 4, 1986, 1 FCC Rcd at 546 - 548 (Appendix I).

[10] Report and Order, 2 FCC Rcd at 1835.

[11] Note 3, *supra*.

[12] Generally, each DFA's boundaries coincide with the boundaries of the Metropolitan Statistical Area as defined by the Census Bureau. Public Notice of November 4, 1986, 1 FCC Rcd at 543. Although there were 50 urban centers, only 46 DFAs were defined because four of the 50 markets were located so closely to four other markets that attempting to grant separate licenses for each market would have been resource intensive for our licensing division without an offsetting benefit to the public. Consequently, these eight markets were merged into four markets and twenty licenses were granted in each of the merged markets.

[13] No licenses will be granted in these border areas pending further discussion with the adjacent country.

[14] Generally, the boundaries of the DFAs were separated by more than 70 miles. Co-channel systems normally must be separated by 70 miles. 47 C.F.R. § 90.621(b). Where, however, areas within one DFA were less than 70 miles from areas within another DFA, we could not license systems within each of these DFAs unless we knew the locations of the co-channel systems. We resolved the problem by granting licenses in the higher-ranked DFA first then processing the applications in the neighboring lower-ranked DFA. The tentative selectees in these lower-ranked DFAs are required to locate their transmitter sites in compliance with 47 C.F.R. § 90.621(b).

[15] Several Phase I licensees have constructed secondary sites. These secondary sites, whether located inside or outside the DFAs, are not afforded interference protection from future 900 MHz licensees.

[16] *See* Public Notice of November 4, 1986, 1 FCC Rcd at 543 and 47 C.F.R. § 90.621(b).

[17] A licensee may use additional base stations to provide a larger coverage area than that provided by its single primary base station. Such additional stations are considered secondary sites, however, and are afforded no interference protection from other co-channel systems, nor may the stations create interference to other co-channel systems. 47 C.F.R. § 90.631(g) and (h).

[18] These operators desire each station within the system to have interference protection from other co-channel licensees.

[19] *See* 47 C.F.R. § 90.627(b).

[20] Similarly, we received a Petition for Rule Making from the American SMR Network Association (ASNA) requesting we amend our rules to allow a rural 800 MHz (806-821/821-866 MHz band) SMR operator to split its channels at multiple sites to provide a greater area of service, RM 6724, filed March 27, 1989. *See* paras. 8 - 12, *infra*.

[21] *See* Memorandum Opinion and Order, American Mobile Data Communications, 4 FCC Rcd 3802 (1989) (AMDC was granted waivers of the Commission's Rules to implement a nationwide digital network in the 900 MHz band); Order, Waiver of Sections 90.621(d), 90.623(a), 90.629, 90.633 and 90.651(c) of the Commission's Rules to License Use of Six Conventional 900 MHz Frequency Pairs for an Advanced Train Control System, 3 FCC Rcd 427 (1988); Public Notice, Private Radio Bureau Requests Comments on Millicom Radio Telephone Company Inc.'s Request for Waiver and Other Relief to Permit Construction of a Nationwide Two-Way Mobile Data and Voice Communications Network in the 900 MHz Spectrum, DA 89-1336 (October 20, 1989). *See also* Notice of Proposed Rule Making, Amendment of Part 90 of the Commission's Rules to Provide for Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, FCC 89-327, adopted November 28, 1989 (The Commission proposed, *inter alia*, national system licenses in the 220-222 MHz band). In addition, Motorola, Inc., has announced a national network in the 800 MHz SMR band, CoveragePlus.

[22] Our understanding of the proposal is that this primary site will not necessarily have any authorized channels constructed at it.

[23] The 70-mile co-channel interference protection standard would continue to apply, although a licensee could short-space its own authorized channels. 47 C.F.R. § 90.621(b).

[24] 47 C.F.R. § 90.631(d).

[25] *See* 47 C.F.R. § 90.631(d). A rural area is beyond a 100-mile radius of the geographic center of the designated urban areas listed in 47 C.F.R. § 90.631(d). Even though an area is outside the 100-mile radius of the geographic center of those areas listed in 47 C.F.R. § 90.631(d), however, it is not considered rural if a waiting list exists.

[26] Comments were received from Futronics, Inc., National Association of Business and Educational Radio, Inc. (NABER), and Association of American Railroads (AAR).

[27] *See* note 25, *supra*.

[28] Our review of licensing records for 800 MHz SMR stations, see paragraph 5, *supra*, also revealed a number of systems owned or managed by the same entity providing coverage to contiguous markets. An example is a corporation with 17 systems in Florida that either owns or manages that provides service to Daytona Beach, Tampa, Orlanda, and various other locations between those areas.

[29] As noted above, in some markets all 900 MHz channels have been licensed in Phase I. *See* note 4, *supra*.

[30] An applicant applying for a national license would not request specific frequencies. Nor would the specific frequencies set aside for national licensing necessarily coincide with frequencies that a national license applicant may already hold under Phase I license authorizations.

[31] We have not selected the specific 60 channels that would be set aside for national licenses. We solicit comments on what criteria we should use to select the channels proposed to be set aside for national licenses.

[32] *See* note 21, *supra*.

[33] It may be argued that no change is necessary to Section 90.627 because the stations are part of one system. The stations, however, might not have the same frequencies constructed at them and might have separate call signs. To prevent any controversy over the underlying use of the national licensee's stations located within 40 miles of each other, we propose to exclude these licensees from the application of the rule. This does not mean, however, that a national licensee could construct other 900 MHz non-nationwide stations within 40 miles of any unloaded nationwide station.

[34] *See* paras. 8 - 11, *supra*.

[35] 47 C.F.R. § 90.627(b).

[36] Generally, the the urban areas listed in 47 C.F.R. § 90.631(d) are also wait list areas.

[37] As the demand for frequencies in an urban/wait list area is high, we do not need to encourage use of either 800 MHz or 900 MHz SMR frequencies in these areas. Consequently, our policy will remain that all assigned channels of an urban/wait list area system must be constructed at one site, although the licensee may use secondary sites for coverage fill-in. Licensees in ur-

ban/wait list areas will not be permitted to split their channels among multiple sites unless they make a strong showing that the technology to be used is as spectrally efficient as trunking.

[38] *See* note 25, *supra*.

[39] Applications for conventional and trunked radio facilities must be prepared on FCC Forms 574 and 574A and must be submitted or filed in accordance with 47 C.F.R. § 90.127. 47 C.F.R. §90.605.

[40] The primary site may not be modified for licensing purposes unless the system's additional sites remain within a 40-mile radius of the proposed primary site. We would not require, however, any channels to remain constructed at a primary site if the licensee no longer required them.

[41] A system initially constructed with only one base station may apply for modification of its license to construct additional base stations to expand the system's coverage.

[42] We propose that no licensee of either a rural or an urban SMR system be authorized more than ten unloaded channels at any time. Accordingly, we propose that an applicant seeking to expand a 900 MHz SMR rural system must have a loading level of 70 mobiles and control stations per channel for five of the initial ten channels assigned to the existing system subject to the expansion application. The licensee may apply for an additional five channels upon reaching the aforesaid loading level. Expansion of a 900 MHz SMR rural system with fifteen constructed channels, would require a loading level of 70 mobiles and control stations per channel for ten of the fifteen channels. *See* para. 45, *infra*. An 800 MHz SMR rural system, initially assigned five channels, could apply for five additional channels by constructing the initial five channels. To expand the system further would require the licensee to load five of the ten channels to a level of 70 mobiles and control stations per channel. The licensee could apply for an additional five channels if the aforesaid loading level was met. *See* para. 45, *infra*.

[43] 47 C.F.R. § 90.645.

[44] *See* Report and Order, Amendment of Part 90, Subparts M and S of the Commission's Rules, 3 FCC Rcd 1838, 1848-1849 (1988)(Report and Order, Docket No. 86-404); 47 C.F.R. § 90.645(h).

[45] *See* 47 C.F.R. § 90.637(c)

[46] American Petroleum Institute (API) filed a Petition for Rule Making in which it requested that we reallocate the 200 SMR channels in areas outside a 100-mile radius of each of the top 50 markets to fixed operations. Petition for Rule Making, Amendment of Parts 2 and 94 of the Commission's Rules to Allocate Spectrum in the 896-901 MHz and 935-940 MHz Frequency Bands for Multiple Address System and Point-to-Point Operations, RM 6579, October 27, 1988. API argued that the additional communication capacity was needed more for fixed operations in these areas than for mobile operations. SMR interests opposed the petition because those SMR applicants had not yet been allowed to apply for use of the channels outside the DFAs. The staff dismissed the petition as premature. Order, Amendment of Parts 2 and 94 of the Commission's Rules to Allocate Spectrum in the 896-901 MHz and 935-940 MHz Frequency Bands for Multiple Address System and Point-to-Point Operations, 4 FCC Rcd 4979 (Private Radio Bureau, 1989). API filed an Application for Review of the Bureau's action on July 20, 1989. For the most part, our proposal for fixed operation on a co-primary basis with mobile operations outside the 100-mile radius of the 46 DFAs, discussed in paragraphs 31 through 33, *infra*, addresses the issues raised in API's initial petition for rule making and its application for review. Nevertheless, the application for review will be addressed in a separate proceeding.

[47] Our proposal to allow fixed operations on a co-primary basis in rural areas should not be taken as an invitation for waiver requests or petitions for rule making to permit fixed operations on a co-primary basis in urban or wait list areas. All spectrum allocated for mobile operations in urban areas is needed for mobile operations. SMR operators in urban or wait list areas have sufficient incentives to use the spectrum intensively. Accordingly, we will not favorably consider requests to expand fixed operations on a co-primary basis with mobile operations in urban or wait list areas.

[48] *See* 47 C.F.R. §§ 90.235 and 90.621(b).

[49] In the event that the licensee is not responsive to complaints of interference from end users of the various stations within a system and the Commission is required to intervene, the station first in time would be given priority and afforded interference protection.

[50] 47 C.F.R. Part 90, Subpart S.

[51] If these fixed operations should cause interference to existing land mobile licensees, the operator of the fixed service would have to cure the interference. If the interference could not be cured, then the operator would have to terminate operation. Mobile operations authorized after a fixed operation in a given area would have to provide interference protection to the fixed operation station.

[52] *See* 47 C.F.R. §§ 90.155, 90.631.

[53] The Communications Act of 1934, as amended, permits private land mobile licenses to be issued for as long as ten years. 47 U.S.C. § 307. Under our existing rules, the license period for the private land mobile services is generally five years. 47 C.F.R. § 90.149. In light of our proposal to increase the time for constructing national systems, we also propose to increase the authorized license term for the national systems to ten years. Reason dictates that a licensee should not be required to renew its license prior to the period it is required to have constructed its system. Increasing the license term should provide the security and incentive to licensees to develop national systems..

[54] We have proposed the same periodic construction benchmarks in our Notice of Proposed Rule Making for nationwide licensees in the 220-222 MHz band. Notice of Proposed Rule Making, FCC 89-327, adopted November 28, 1989.

[55] *See* 47 C.F.R. § 90.127(b).

[56] In the 220 MHz Notice of Proposed Rule Making, we also propose that the nationwide licensee completely forfeit use of the national frequencies and that the forfeited nationwide frequencies would be reassigned to a new national licensee, but only if, the initial national licensee has failed to meet the ten percent and forty percent construction benchmarks at the end of either the two or four year period, respectively. Unlike the proposal in this Notice of Proposed Rule Making, if at the end of the six and ten year periods a national licensee in the 220-222 MHz band has not met the seventy percent and one hundred percent levels, the licenses for the unbuilt facilities would cancel automatically in areas where the licensee has failed to construct and channels would become available as non-nationwide assignments on a channel-by-channel, area-by-area, basis. We would grant exclusivity to the nationwide licensee's existing facilities in the 220-222 MHz band using a co-channel separation of seventy miles. Notice of Proposed Rule Making, FCC 89-327, adopted November 28, 1989.

[57] The previous national licensee could apply for non-nationwide frequencies and relicense the constructed stations if such frequencies were available in the required area.

[58] We specifically request comments on the proposal herein as compared to our proposal in the Notice of Proposed Rule Making in the use of 220-222 MHz band. *See* note 55, *supra*.

[59] 47 C.F.R. §§ 90.155 and 90.631(e) and (f).

[60] Applicants for trunked systems must certify that a minimum of 70 mobiles per channel authorized will be placed in operation within five years of the initial license grant. If at the end of five years a trunked system is not loaded to the prescribed levels and all channels in the licensee's category are assigned in the system's geographic area, authorization for channels not loaded to 100 mobiles per channel cancels automatically. 47 C.F.R. § 90.631(b).

[61] Generally, a licensee of a trunked system applies for renewal of its initial license at five years. Consequently, we selected a five year period to review loading levels of a trunked system to coincide with the renewal of a license for a trunked system.

[62] All licensees who are authorized initially before June 1, 1993, and are within their original license term are subject to the minimum loading levels to retain all assigned channels after five years. *Id.*

[63] *See* note 25, *supra*.

[64] 47 C.F.R. § 90.631(c).

[65] 47 C.F.R. § 90.631(a).

[66] *See* notes 59 and 61, *supra*.

[67] An applicant seeking to expand a trunked system in an urban/wait list area by requesting additional channels must have a loading level of 70 mobiles per channel on the existing system subject to the expansion request. 47 C.F.R. § 90.631(c).

[68] Rural SMR operators are able to apply for an additional five channels to expand an existing system upon the construction of its initial authorized channels without regard to the number of mobiles licensed to the constructed channels. 47 C.F.R. § 90.631(d).

[69] *Id.*

[70] "[W]e are amending our rules to permit SMR trunked licensees in rural areas to obtain five more channels than they have constructed, up to a system total of 20 channels. For example, a five-channel system may obtain five additional channels regardless of their current system loading. To add an additional five channels (to a total of fifteen), however, the licensee must show that the first five channels are fully loaded." Report and Order, Docket No. 86-404, 3 FCC Rcd at 1846.

[71] "For the licensee of a ten channel rural system to obtain an additional five channels, the licensee would need to load five of its existing channels [footnote omitted]. Another way to view this is that a system in a rural area is limited to no more than ten unloaded channels. Mere construction of a ten channel system would not be sufficient to entitle a licensee to additional channels." Memorandum Opinion and Order, Amendment of Part 90, Subparts M and S of the Commission's Rules, 4 FCC Rcd 356, 359 (1989).

[72] We have proposed to determine rural multiple site systems' loading by dividing the total mobile units and control stations licensed to a system by the total number of channels assigned to the system. *See* para. 29, *supra*.

[73] The four year restriction coincides with the four year construction benchmark proposed in paragraph 38, *supra*.

[74] *See* para. 38, *supra*.

[75] These third parties, however, would have to meet the eligibility requirements of Section 90.603 of our Rules, 47 C.F.R. § 90.603.

[76] *See* Public Notice, Private Radio Bureau Reminds Licensees of Guidelines Concerning Operation of SMR Stations Under Management Contracts, No. 1932 (March 3, 1988).

[77] We propose to require notification to be made by letter similar to the notification requirements found in Section 90.135(d) of the Rules, 47 C.F.R. § 90.135(d). The letter should include the name and address of the licensee as they appear in the Commission's records, the name and address of the sublessee or franchisee, and the call sign(s) of all stations affected.

[78] In the conventional 800 MHz band, we have proposed to allow limited for-profit transfer of unconstructed authorizations because we found it might serve the public interest. Notice of Proposed Rule Making, In the Matter of Trunking in the Private Land Mobile Radio Services for More Effective and Efficient Use of Spectrum, 4 FCC Rcd 312, 315 (1989).

[79] In many markets below the top ten DFAs, stations have not been constructed. Generally, the licensees that have failed to construct appear to have been unfamiliar with SMR operations, appear to have no means of financing construction of the stations, and appeared to be waiting for the best offer from a third party to become a system manager and excercise an option to buy upon construction of the station.

[80] The commitment would have to include realistic and prudent costs of construction of the entire system and associated operating expenses for the duration of the initial term of the license, evidence that the lender has examined the financial condition of the applicant and determined him creditworthy, and evidence that the lender has examined the proposed system and is willing to provide the necessary financing based solely on the lender's relationship with the applicant. The financial institution would have to be either a state or federally chartered bank or savings and loan association, other recognized financial institution, financial arm of a capital equipment supplier, or legitimate non-bank institutions. Applicants relying on firm financial commitments from non-bank institutions would have to demonstrate that the non-bank institution has sufficient funds available to cover the total commitments it has made. *See generally*, Fourth Report and Order, CC Docket No. 85-388, 4 FCC Rcd 2542 (1988).

[81] Section 90.123(a) of our Rules, 47 C.F.R. § 90.123, requires full and complete disclosures with regard to the real party or parties in interest. Because our Rules restrict the number of frequencies an entity can be licensed for in a given area (47 C.F.R. §§ 90.623, 90.627), some applicants have attempted to disguise the real parties in interest. As each applicant would have to present its financial qualifications, violations of these rules would be more readily apparent. Currently, we have no attribution rules for Part 90 licensees nor do our rules distinquish between minority or majority interests in determining whether a real party issue exists. We issued policy statements on this matter, however, during the initial phase of 900 MHz SMR licensing. *See* Public Notice of November 4, 1986, note 3, *supra*. We do not propose to implement attribution rules or set a *de minimis* interest that would be permitted.

[82] We have proposed to require a national licensee to include with the ten-year construction schedule a certification that, within ten years of receiving a license, it will build and have in permanent operation at least one base station in each of 50 of the urban centers listed in Appendix B. *See* paragraph 20, *supra*.

[83] 47 C.F.R. § 1.1102. If Congress ultimately changes the $30.00 fee currently in effect, the minimum fee for a national licensee would also change as the amount of the fee will depend on the fee schedule in effect at the time of the application filing.

[84] If after a national license is granted for a block of frequencies, that block of frequencies is reclaimed from a Phase I licensee, the national licensee may then construct in or near the

DFA in which the frequencies were previously authorized. The national licensee, however, would have to file an application to modify its license.

[85] 47 C.F.R. § 1.972

[86] 47 C.F.R. §§ 90.127 and 90.607(b).

[87] A Public Notice will be issued listing the locations of all Phase I primary base stations. A Phase I licensee may file for modification of its license to relocate its primary base station after the Public Notice has been issued, but will lose its priority for protection from new licensees. Applicants that fail to afford the proper interference separation from listed Phase I stations and have not requested a waiver of 47 C.F.R. § 90.621(b), will have their applications dismissed.

[88] 47 C.F.R. § 90.611(d). Separate waiting lists for a particular area will be kept for 800 and 900 MHz trunked systems. Report and Order, Amendment of Part 90, Subparts M and S of the Commission's Rules, 3 FCC Rcd 1838, paras. 48 - 49 and n. 53 (1988). Waiting lists for the 900 MHz channels will be established, if necessary, after the Commission begins to accept additional 900 MHz applications. *Id.* at n. 53.

[89] We propose to grant only those additional sites that afford 70-mile co-channel interference protection.

[90] 47 C.F.R. § 90.611(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 89-349

In the Matter of

Amendment of Part 2 of the Rules
concerning the importation of
radio frequency devices capable of
causing harmful interference

ORDER

Adopted: October 12, 1989; Released: October 13, 1989

By the Chief, Field Operations Bureau:

1. On October 11, 1989, the American Electronics Association Task Force for the Reform of the FCC Form 740 Procedures (AEA) filed a request for extension of time, asking that the date for filing reply comments in this proceeding be extended from October 13, 1989, to October 30, 1989. Counsel for AEA state that they have initiated discussions with other commenters in order to reconcile differences in approach among them. They assert that their efforts will "significantly facilitate the Commission's efforts."

2. Counsel for AEA also provide certification that they have served a copy of their motion upon all of the parties filing in this proceeding.

3. While we do not routinely grant extensions of time, we are convinced that the public interest in the development of a full and complete record in this proceeding would be served and the maximum amount of useful participation by interested parties gained by allowing additional time for the filing of replies. Thus, we conclude that it is appropriate to extend the date for filing replies to October 30, 1989, as requested.

4. Accordingly, IT IS HEREBY ORDERED, pursuant to Sections 4(j) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(j) and 155(c), and authority delegated thereunder pursuant to Sections 0.111 and 0.311 of the Communication's Rules, 47 C.F.R. §§ 0.111 and 0.311, that AEA's motion IS GRANTED, and that reply comments in this proceeding ARE TO BE FILED by October 30, 1989.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 28, 1989

COMMON CARRIER BUREAU SOLICITS COMMENTS REGARDING MODIFICATIONS AND IMPROVEMENTS TO THE TARIFF REVIEW PLAN

To aid its review of the required annual revisions of the local exchange carriers' (LECs) interstate access tariffs, the Common Carrier Bureau has developed Tariff Review Plans (TRPs). TRPs specify certain information that LECs must file in a uniform format. In each of the last four years, the Bureau has prepared TRPs, after consultation with the LECs and their customers, reflecting both the specific information needed in light of changes in relevant Commission rules and policies and the most effective and least burdensome methods of supplying this information. The TRPs developed through this process are subject to approval by the Office of Management and Budget in accordance with the provisions of the Paperwork Reduction Act, 44 U.S.C. §§ 3506 et seq.[1]

In preparation for the 1990 annual access tariff filings, the Bureau is examining changes in the TRP necessary to reflect recent and anticipated rule changes and other events, and our experience in using TRPs. The most significant anticipated rule change for the 1990 annual access tariff filings is the possible introduction of price caps for the LECs. Such a rule change would substantially alter the type and quantity of data required by the TRP. Under Section 61.38(b) of the Commission's Rules, LECs are currently required to file a cost of service study for the most recent 12 month period, and a study containing a projection of costs for a representative 12 month period. Under the proposed price cap rules being considered now, LEC tariff filings must be accompanied by data sufficient to calculate the price cap index (PCI), average price index (API), and service band index (SBI).[2]

As we have in the past, the Bureau wishes to obtain the views and advice of customers and other interested persons in order to develop any needed modifications and improvements in the TRP. In order to adopt a final TRP as far in advance of the annual access tariffs filing date as possible, and to enable the TRP to provide the information needed by the Commission to conduct its review of the tariffs in accordance with the Communications Act, the Bureau has determined that an expedited and informal procedure would be most useful.

Interested persons wishing to express their views regarding modifications and improvements to the TRP may do so by letter addressed to the Chief, Tariff Division, Common Carrier Bureau, Federal Communications Commission, 1919 M Street, N.W., Room 518, Washington, D.C. 20554. We invite comment on the form the TRP should take both under the current rules and under the possible price cap rules. These comments should be received no later than December 12, 1989, to allow the Bureau an opportunity to consider them. No reply comments will be considered.

For further information, contact Chris Frentrup (202) 632-6312 of the Common Carrier Bureau, Tariff Division.

FEDERAL COMMUNICATIONS COMMISSION

FOOTNOTES

[1] The 1989 TRP, adopted in Commission Requirements for Cost Support Material To Be Filed with 1989 Annual Access Tariffs, DA 88-1554, Order, released October 3, 1988, bore OMB approval number 3060-0400.

[2] *See* Policy and Rules Concerning Rates for Dominant Carriers, Report and Order and Second Further Notice of Proposed Rule Making, CC Docket No. 87-313, 4 FCC Rcd 2873, 3349-50 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

DAVID B. HODGES 0170104-87036
6705 Maurleen Road
Baltimore, MD 21209

Amateur Radio Station N3DTH and
General Class Operator License

MEMORANDUM OPINION AND ORDER

Adopted: December 12, 1989; Released: December 19, 1989

By the Commission:

I. INTRODUCTION

1. We have before us an application for review filed by David B. Hodges of a $1,200 monetary forfeiture imposed by the Private Radio Bureau (the Bureau) for willful violation of Sections 97.125 (willful or malicious interference) and 97.84 (failure to identify) of the Commission's Rules, 47 C.F.R. §§ 97.125 and 97.84.[1] This action denies the application for review.

II. DISCUSSION

2. Beginning in 1985, we received a number of complaints of interference to the Baltimore Radio Amateur Television Society (BRATS) amateur repeater.[2] On May 4, 1987, Commission engineers observed interference, consisting of dual tone multi-frequency (touchtone[R] or DTMF) tones and unmodulated carriers transmitted on the repeater's input frequency, which they determined came from Hodges' amateur station N3DTH. These unidentified transmissions were retransmitted on the repeater's output frequency, causing harmful interference to the communications of the users of the repeater.

3. The unidentified DTMF tones and carriers were interspersed among legal transmissions from Hodges' station that were identified by his call sign, N3DTH. The engineers used the "signal signature" method [3] to establish that the interfering transmissions were from the same transmitter as those identified by Hodges' call sign. They also tested Hodges' transmitter, which he brought to the Commission's Baltimore office, and confirmed that it was the source of the violative transmissions. Hodges says that he does not recall whether he made the May 4, 1987 transmissions but that he has on occasion made such transmissions to cause interference when provoked by others.[4]

4. Hodges argues that he has held a license since 1970 and has never before been cited for any violation. He states that he has learned a great deal from this experience, has matured, and will not violate Commission Rules in the future.[5] Operation in compliance with our Rules, however, is expected of Commission licensees. *Raymond C. Standring*, 68 FCC 2d 1021, 1022 (1978). Thus Hodges' asserted good conduct in the past is immaterial to our disposition of the instant violations. Additionally, a promise to reform does not mitigate past violations. It is the anticipated result of enforcement sanctions. *WWIZ, Inc.*, 37 FCC 685, 686 (1964); *Raymond C. Standring, supra*, 1024.

5. Hodges attempts to explain his actions by claiming that they were simply an overreaction provoked by harassment from others.[6] Harassment, however, does not justify retaliating with willful or malicious interference. *See James W. Smith*, 102 FCC 2d 258 (Rev. Bd. 1985), *aff'd*, 2 FCC Rcd 594 (1986). *See also Henry C. Armstrong, III*, 92 FCC 2d 485 (Rev. Bd. 1983); *Jonathan M. McFadden*, 75 FCC 2d 212 (Rev. Bd. 1979).

6. Additionally, Hodges claims that others have also caused interference to the BRATS repeater.[7] He offers no proof of this claim, and in any event, the violations of others do not absolve him from responsibility for his own violations. As we have often stated, "[W]hile our limited resources may result in some violators going unpunished, that does not mean that we cannot impose sanctions against those violators we do find." *KMAP, Inc.*, 46 FCC 2d 978, 979 (1974).

7. Hodges also contends that his violations are mitigated by public service contributions.[8] An amateur's public service contributions, even if substantial, do not mitigate violations that warrant enforcement sanctions. *See Robert P. Milbert*, 71 FCC 2d 1291 (1979). *See also Donald E. Gilbeau*, 91 FCC 2d 98 (Rev. Bd. 1982), *recon. denied*, 91 FCC 2d 1191 (Rev. Bd. 1983).

8. Finally, Hodges indicates that the forfeiture is a financial hardship and urges that the expense of paying his lawyer should be considered as a mitigating factor.[9] We will mitigate the financial hardship by permitting him to pay the forfeiture in $100 monthly installment payments. Any expense he may have incurred to retain counsel resulted from his own choice and will not be considered as a separate mitigating factor.

III. DECISION

9. The facts discussed above establish that Hodges willfully violated Sections 97.84 and 97.125 of the Commission's Rules, 47 C.F.R. §§ 97.84 and 97.125, on May 4, 1987. Further, his violative transmissions consisted of unidentified touchtones and unmodulated carriers, which makes the case against him particularly strong and emphasizes the willfulness and malice of his interference. Such transmissions can serve no legitimate purpose and were clearly intended to cause harmful interference. His failure to identify his transmissions was obviously intended to make detection difficult and unlikely. Additionally, as discussed above, none of his arguments excuse or mitigate the violations.

10. Accordingly, IT IS ORDERED that David B. Hodges' application for review IS DENIED and that he shall pay the monetary forfeiture of $1,200 in twelve $100 monthly installments. The first installment is due 30 days from the release of this *Memorandum Opinion and Order*[10] and the second through twelfth installments in succeeding months. Payment should be made by check or money order payable to the Federal Communications Commission and sent to Fiscal Accounting Section, Room 452, Federal Communications Commission, Washington, D.C. 20554. The number 0170104-87036 should be placed on each remittance.

11. IT IS FURTHER ORDERED that a copy of this *Memorandum Opinion and Order* be mailed to David B. Hodges at the address shown in the caption.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The Bureau issued a Notice of Apparent Liability to Monetary Forfeiture (NAL) to Hodges on March 21, 1988. After considering Hodges' response to the NAL the Bureau issued a Notice of Forfeiture to Hodges August 2, 1988. Hodges requested reconsideration, which the Bureau denied on December 1, 1988, and he filed the instant application for review on December 29, 1988.

[2] A repeater receives a signal on its input frequency and retransmits the same signal on its output frequency. Its purpose is to increase the range of transmitted communications. Repeaters are generally established at high elevations so that amateurs using them may use low power, hand-held walkie-talkies or transmitters installed in their cars and operated from a lower elevation.

[3] The signal signature method involves comparing the profile of an unidentified signal with the profile of signals emitted by a known transmitter. It is a method of determinining whether an unidentified signal originated from a specific transmitter.

[4] Letters from David Hodges to FCC (Nov. 9 and Dec. 1, 1987); interview with David Hodges at Baltimore Field Office (Nov. 19, 1987).

[5] Letter from Gary Huddles, Esq. to John B. Johnston (Sept. 1, 1988); letters from David Hodges to FCC (Nov. 9 and 24, 1987) and to Thomas Fitz-Gibbon (Oct. 27, 1988).

[6] Letters from David Hodges to FCC (Dec. 1, 1987) and to Thomas Fitz-Gibbon (Dec. 28, 1987, and Jan. 19, Apr. 20, and Oct. 27, 1988); letter from Gary Huddles, Esq. to John B. Johnston (Sept. 1, 1988); tape of transmissions on BRATS repeater sent by David Hodges to FCC (Dec. 7, 1987).

[7] Letter from David Hodges to Thomas Fitz-Gibbon (Apr. 20, 1988).

[8] Letters from David Hodges to FCC (Nov. 9, 1987) and from Gary Huddles, Esq. to John B. Johnston (Sept. 1, 1988).

[9] Letter from David Hodges to FCC (Nov. 24, 1987) and to Thomas Fitz-Gibbon (Apr. 20, 1988); letter from Gary Huddles, Esq. to Carol Fox Foelak (Dec. 15, 1988).

[10] Hodges may, if he wishes, pay the forfeiture in a lump sum or in larger installments than $100.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Monetary
Forfeiture Against

Texidor Security Equipment, Inc.
G.P.O. Box 3867
San Juan, Puerto Rico 00936

Case Nos. 3153204-88021

L-2810

Licensee of Station KNDE 363
in the Business Radio Service

MEMORANDUM OPINION AND ORDER

Adopted: December 12, 1989; Released: December 19, 1989

By the Commission:

I. INTRODUCTION

1. On October 7, 1988, Texidor Security Equipment, Inc. (Texidor) filed an Application for Review of the imposition of a $1000 monetary forfeiture against it for violation of Section 90.403(e) of the Commission's Rules, 47 C.F.R. § 90.403(e).[1] This *Memorandum Opinion and Order* disposes of Texidor's Application for Review.[2]

II. BACKGROUND

2. On September 17, 1982, Texidor was granted license KNDE 363 on a frequency pair in the Business Radio Service. On January 31, 1984, this license was amended to authorize operation by Texidor on the frequencies 452.900 MHz and 452.950 MHz, normally available for assignment in the Railroad Radio Service, pursuant to inter-service sharing procedures. [3] In granting this amendment to Texidor's license, the Commission imposed the following condition, written upon the face of Texidor's license document:

> SP: Authorized only on secondary non-interference basis to regular base/mobile operations on the frequency.[4]

This condition was imposed because Texidor had expressed its intention to engage in fixed, point-to-multipoint, operations. Such operations are inconsistent with the intended use of this spectrum, which is allocated for land mobile operation. Texidor did not object to this condition.

3. Texidor uses station KNDE-363 to operate a security system for banks. The central station in the system automatically interrogates the remote stations by radio and determines the status of the remote stations in each of the protected banks. When all of the branches in the system have been polled, the cycle begins again. Texidor represents that its system currently protects 160 bank branches and assets of over $1 billion.

4. On December 23, 1986, Estereotempo, Inc. was granted a license for station WNHU-467 in the Business Radio Service to operate on the frequencies 461.700 MHz and 466.700 MHz. On April 18, 1988, pursuant to inter-service sharing procedures, this license was modified to authorize operation by station WNHU-467 on the frequencies 452.900 MHz and 457.900 MHz as well. Estereotempo's transmissions were not restricted to secondary status because, unlike Texidor, Estereotempo planned to engage in land mobile operations consistent with the intended use of the spectrum for which it was licensed.

5. On April 26, 1988, Estereotempo wrote a letter to Texidor complaining about co-channel interference to station WNHU-467 on the frequency 452.900 MHz caused by transmissions from station KNDE-363. Texidor did not reply to this letter. On May 24, 1988, the Commission's San Juan Field Office received a letter from Estereotempo complaining about this co-channel interference. On May 26, 1988, the Engineer in Charge (EIC) of the San Juan Field Office called Mr. Gabriel Texidor III, President of Texidor, and informed him by telephone that station KNDE-363 was apparently operating without prior monitoring and was causing harmful interference.

6. At the same time, the San Juan Field Office began monitoring the frequency 452.900 MHz in Puerto Rico to determine whether Texidor was complying with Commission Rules. On the basis of this monitoring Commission field personnel concluded that station KNDE-363 never monitored the frequency 452.900 MHz before operation and, therefore, prevented station WNHU-467 from using that frequency.

7. On June 13, 1988, the EIC issued a Notice of Violation (NOV) to Texidor of Sections 90.403(e), (f), and (g) of the Commission's Rules, 47 C.F.R. §§ 90.403 (e), (f), and (g), for failing to monitor the transmitting frequency (452.900 MHz) on June 1, 1988, prior to using it and, therefore, causing harmful interference to co-channel users. The NOV specified that station KNDE-363 was observed radiating a steady carrier and transmitting data without first monitoring the channel for prior occupancy by other users. Texidor never replied to the NOV.[5]

8. After the issuance of the NOV, Commission field personnel in the San Juan Field Office made repeated calls to Texidor Security Equipment, Inc. Mr. Texidor was never available and did not return these calls. On July 13, 1988, the EIC issued a Notice of Apparent Liability to Monetary Forfeiture (NAL) in the amount of $1000 to Texidor for willful violation of Section 90.403(e) of the Commission's Rules as a result of the transmissions of station KNDE-363 on June 1, 1988. The NAL specified that station KNDE-363 was causing harmful interference to co-channel licensees. The NAL further specified that the license for station KNDE-363 permits operation on only a secondary non-interference basis.

9. On August 12, 1988, the San Juan Field Office received Texidor's reply to the NAL. In its reply Texidor argued that Section 90.403(e) of the Commission's Rules suggests but does not require prior monitoring of a frequency before transmitting. Texidor contended that the "reasonable precautions" required by Section 90.403(e) are those that are reasonable for a central station operation, not necessarily those sufficient to protect a co-channel licensee absolutely. Texidor maintained that its secondary, non-interference status has no bearing on whether it violated this operating rule. Texidor also ar-

gued that because the Commission granted the license for Texidor's operation, the Commission is at fault for Texidor's inherent interference to other operations. Texidor suggested that it was the Commission's responsibility to refrain from licensing other users on the spectrum occupied by Texidor. Also, Texidor stated that rather than being a rule violator itself, it is the injured party being forced off the air by an "opportunistic newcomer."[6]

10. On August 16, 1988, the EIC issued a Notice of Forfeiture (NOF) in the amount of $1000 for this matter. In the NOF the EIC stated:

> In your reply dated August 8, 1988, your counsel submits no evidence which would warrant cancellation or mitigation of your forfeiture. The fact remains that Texidor Security Equipment, Inc., accepted the conditions of the license upon using it. No effort to change the terms of the license was initiated by the licensee, who is ultimately responsible for compliance with all FCC Rules and Regulations.[7]

11. On October 7, 1988, Texidor filed an Application for Review of the NOF issued by the EIC.[8] The Application for Review sought cancellation of the forfeiture and time for Texidor to continue operation in the manner found to be violative by the EIC until such time as Texidor is able to move to another frequency. In addition to reiterating many of the arguments made in its response to the NAL, Texidor maintained that factual allegations of harmful interference in the NAL and NOF are insufficient to warrant issuance of a forfeiture for violation of Section 90.403(e). Also, Texidor expressed the view that the EIC did not properly apply the standards of Section 1.80(b)(3), 47 C.F.R. § 1.80(b)(3), in this instance, in that the forfeiture penalty does not account for the nature, circumstances, extent and gravity of the situation. Texidor states that it should receive favorable treatment under Section 1.80(b)(3) because it is not a deliberate "jammer," because this was really a licensing problem, and because it provides an essential service to banks in Puerto Rico.

III. DECISION

12. For the reasons stated below, we uphold issuance of a forfeiture in the amount of $1000 to Texidor for violation of Section 90.403(e) on June 1, 1988. We find no fault with the NAL and the NOF issued by delegated authority by the Engineer in Charge of the San Juan Field Office.

13. *Monitoring*. Texidor argues that Section 90.403(e) does not require, but only suggests, that reasonable precautions to avoid causing harmful interference would include monitoring the frequency for ongoing communications prior to transmitting. Section 90.403(e) states:

> Licensees shall take reasonable precautions to avoid causing harmful interference. This includes monitoring the transmitting frequency for communications in progress and such other measures as may be necessary to minimize the potential for causing interference.[9]

Monitoring the transmitting frequency for communications in progress was clearly necessary in these circumstances. Texidor had availed itself of no other means to minimize potential for causing interference. In the absence of any other precautions, monitoring the transmitting frequency for communications in progress was the minimum precaution Texidor had to take to avoid causing harmful interference.

14. *Reasonable precautions*. Texidor does admit in its pleadings that "reasonable precautions" to avoid causing harmful interference are required. It contests, however, the nature of the term "reasonable." Texidor maintains that the rule must be read in terms of the intended operation of the licensee. Thus, it is Texidor's view that for its own operation of station KNDE-363 the rule only requires such precautions as would be reasonable for a central station alarm system. Texidor then takes the position that the only reasonable precautions it needs to take against causing harmful interference are to have its frequency coordinated and to obtain a license.[10]

15. This position is unacceptable, particularly for an operation authorized on a secondary, non-interference basis. The fact that Texidor wishes to engage in continuous uninterrupted polling as a central station protection operation does not absolve it of its responsibilities as a Commission licensee. Moreover, licensing a central station protection operation on a shared frequency does not convert that frequency to one of exclusive use by the licensee engaged in central station protection just because of its mode of operation.

16. Coordination and licensing alone are not in and of themselves guarantees against interference. The very essence of the Commission's assignment scheme for Part 90 frequencies below 800 MHz is that these frequencies are shared. Even central station protection operations that are licensed on a co-primary basis must take reasonable precautions not to interfere with one another or with other co-primary operations. In this instance, where Texidor was licensed on a secondary basis to regular base/mobile operations on the frequency,[11] Texidor had to take reasonable precautions calculated to assure that station KNDE-363 did not cause harmful interference to station WNHU-467. Clearly, Texidor did not take such precautions.

17. *Secondary, non - interference status*. Texidor maintains that the special condition on its license authorizing operation on only a secondary non-interference basis to regular base/mobile operation should have no bearing on its liability to monetary forfeiture for violating Section 90.403(e), which is an operating rule. We disagree. The very nature of secondary status is that the station that is secondary must not cause harmful interference to stations that are primary.[12]

18. Because of the secondary, non-interference status of station KNDE-363, station WNHU-467 has absolute priority over station KNDE-363 to use the frequency 452.900 MHz in this geographic area. Texidor must be prepared to take whatever steps are necessary to assure that station WNHU-467 can transmit without interference from station KNDE-363. Moreover, station KNDE-363 must accept interference from station WNHU-467. For this reason, station KNDE-363's continuous carrier for continuous polling by a central station without regard to other licensed operations as required by the secondary nature of its authorization and the provisions of Section 90.403(e) is impermissible.

19. *Licensing*. Texidor maintains that because this Commission granted the license for its central station operation, we are responsible for any interference inherent in the way Texidor operates station KNDE-363. Texidor suggests that once we licensed its operation and knew of it, we had a duty not to license other users for 452.900 MHz in Puerto Rico.

20. Station KNDE-363 was conditionally licensed to operate on a secondary, non-interference basis. A station with this type of conditional authority has no rights with respect to any other normally authorized primary user of the spectrum. The condition is straightforward and has no ambiguity. Texidor may only operate using 452.900 MHz if it finds a way to do so without interfering with the operation of other authorized users of that frequency.

21. Texidor may not bootstrap itself into some status "more equal" to other users of this frequency by pointing to the inherent nature of its central station operation. The nature of the license granted to Texidor places Texidor under an affirmative obligation to find a way to make its central station operation compatible with other operations on 452.900 MHz. If Texidor is unwilling or unable to find a way to make its central station operation compatible with other operations on 452.900 MHz, then station KNDE-363 is required by the conditions of its license to cease operation.

22. Texidor's license states clearly on its face that Texidor may operate only on a secondary, non-interference basis. We, therefore, are under no obligation to protect Texidor's communications from encroachment. Indeed, Texidor's communications, by definition, were always clearly subject to encroachment. Any reliance by Texidor on any other interpretation of its license grant was misplaced.

23. *Harmful interference*. Texidor contends that the EIC drew an unwarranted inference that it violated Section 90.403(e). Texidor maintains that the violation of Section 90.403(e) set forth in the NAL and the NOF is based solely upon evidence that harmful interference occurred. Texidor takes the position that evidence of one or more instances of its causing harmful interference on 452.900 MHz does not establish a *prima facie* case of violation of Section 90.403(e). Texidor alleges that the EIC made no factual determination about whether it failed to take the "reasonable precautions" mandated by Section 90.403(e). Texidor stated:

> Nowhere in the EIC's correspondence is there any mention, let alone a conclusive determination, that Texidor failed to take reasonable precautions in the operation of station KNDE-363.[13]

This statement is not accurate. The NOV to which Texidor failed to respond is explicit in detailing the nature of the violation.[14] Most importantly, however, operation in a manner that constantly causes harmful interference without interruption is *prima facie* evidence of failure to comply with Section 90.403(e).

24. *Section 1. 80 (b) (3) considerations*. Texidor believes that the EIC failed to consider the provisions of Section 1.80(b)(3) of the Commission's Rules. That section states:

> In determining the amount of the forfeiture penalty, the Commission or its designee will take into account the nature, circumstances, extent and gravity of the violations and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.[15]

25. In support of its position, Texidor states that the EIC failed to distinguish between Texidor's operations and those of a deliberate "jammer." Texidor argued that it has made productive use of spectrum that would otherwise have lain fallow for six years by providing an essential service to banks in Puerto Rico. Texidor contends that it is the injured party in this instance, and that Estereotempo is an "opportunistic newcomer" who perceives that a secondary user can be forced off the air or out of business with the cooperation of the FCC.[16]

26. Texidor did not reply to Estereotempo's letter of April 26, 1988, complaining about the harmful interference caused by its operation.[17] Its lack of cooperation with another Part 90 licensee required Commission intervention and expenditure of limited Commission resources. After initial contact with Commission personnel, Texidor took no action to resolve this problem. Texidor did not reply to the June 13, 1988, NOV. From June 13 to July 13, 1988, Mr. Texidor was not available when Commission personnel from the San Juan Field Office repeatedly tried to call him by telephone, and he never returned these telephone calls. Texidor's failures and refusals to cooperate in resolving this matter short of formal Commission enforcement action indicate that it was also in apparent violation of Section 90.173(b) of the Commission's Rules, 47 C.F.R. § 90.173(b).[18] While Texidor has not been separately cited for violation of this rule in this instance, its conduct strongly merits the action that was taken by the EIC.

27. *Time to establish new system*. Texidor has asked for sufficient time to establish a replacement system on another frequency. It appears that by this request Texidor seeks Commission approval to transmit without taking reasonable precautions to avoid causing harmful interference on the frequency 452.900 MHz until it relocates its operations on other frequencies. The Commission cannot and will not grant such approval.

28. Texidor has operated in a manner inconsistent with the terms and conditions of its license and in violation of our rules. It may continue its operations on 452.900 MHz only if it can do so in accord with the terms and conditions of its license and our rules. If it cannot, it must terminate its operations.[19] Continued operation by station KNDE 363 without taking reasonable precautions to avoid causing harmful interference will result in further administrative action by this Commission.

IV. CONCLUSION

29. We find that Texidor has neither provided any additional information nor made any compelling arguments that warrant cancellation or reduction of this forfeiture.

30. Therefore, IT IS ORDERED that the Application for Review filed by Texidor Security Equipment, Inc., IS DENIED. IT IS FURTHER ORDERED that the monetary forfeiture of $1000 be paid within 30 days from the date of release of this *Memorandum Opinion and Order*. Payment should be made by check or money order payable to the Fiscal Accounting Section, Room 452, Federal

Communications Commission, Washington, D.C. 20554. The number 3153204-88021 should be placed on the remittance.

31. IT IS FURTHER ORDERED that a copy of this *Memorandum Opinion and Order* be mailed to Texidor Security Equipment, Inc., at the address shown in the caption, and to its attorney of record, Raymond A. Kowalski, Blooston and Mordkofsky, 2120 L Street, N.W., Suite 300, Washington, D.C., 20037.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] 47 C.F.R. § 90.403(e) states: "Licensees shall take reasonable precautions to avoid causing harmful interference. This includes monitoring the transmitting frequency for communications in progress and such other measures as may be necessary to minimize the potential for causing interference."

[2] The Application for Review was accompanied by a Conditional Petition to Accept Application for Review. The Application for Review was timely filed. Accordingly, the Conditional Petition to Accept Application for Review is moot.

[3] *See* Special Condition 13, License of Station KNDE-363; *see also* Section 90.176 of the Commission's Rules, 47 C.F.R. § 90.176.

[4] The letters "SP" denote a special condition. The stated condition applies to both frequencies assigned to Texidor. If it had applied to only one frequency, that frequency would have been specified on the license document.

[5] Although Texidor enclosed a copy of this NOV in its response to an earlier unrelated NOV, this does not constitute a timely filed reply to the June 13 NOV.

[6] Response to NAL filed by Texidor at 3.

[7] Letter from William C. Berry to Texidor Security Equipment, Inc. (the NOF), August 16, 1988, at 1.

[8] Although it would appear from filing dates that this Application for Review was not timely filed, service difficulties including return of the first certified mailing of the NOF without explanation from the U.S. Postal Service made the date of initial notification to Texidor later than that apparent from the dates of the actions listed.

[9] Section 90.403(e) of the Commission's Rules, 47 C.F.R. § 90.403(e).

[10] Response to NAL filed by Texidor at 2; Application for Review filed by Texidor at 5.

[11] *See* paragraph 2, *supra*.

[12] *See* 47 C.F.R. § 2.104(d)(4).

[13] Application for Review filed by Texidor at 6.

[14] Mr. Texidor also had notice of the specific concerns of the EIC by previous discussions with the EIC by phone.

[15] 47 C.F.R. § 1.80(b)(3).

[16] Response to NAL filed by Texidor at 3; Application for Review filed by Texidor at 8.

[17] *See* paragraph 5, *supra*.

[18] This section states in pertinent part: "All applicants and licensees shall cooperate in the selection and use of frequencies in order to reduce interference and make the most effective use of the authorized facilities. Licensees of stations suffering or causing harmful interference are expected to cooperate and resolve this problem by mutually satisfactory arrangements."

[19] Additionally, we note that regardless of the frequency chosen by Texidor for its operations, it must still take reasonable precautions to avoid causing harmful interference. *See* 47 C.F.R. § 90.403(e).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-583

In the Matter of

Amendment of Section 73.202(b), RM-7052
Table of Allotments,
FM Broadcast Stations.
(Van Wert, Ohio, and
Monroeville, Indiana)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 5, 1989; Released: December 20, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Atlantic Resources Corporation (petitioner), licensee of Station WBYR(FM), Channel 255B, Van Wert, Ohio. Petitioner requests the reallotment of Channel 255B from Van Wert to Monroeville, Indiana, and the modification of its license for Station WBYR(FM) accordingly.

2. Petitioner states that the allotment of Channel 255B to Monroeville would provide the community with its first local service while Van Wert would retain local aural service from Station WERT(AM). Further, it states that no change in Station WBYR(FM)'s transmitter site or facilities is necessary since the transmitter is presently located 2.3 kilometers outside Monroeville, thus clearly providing the entire community with the required 70 dBu city-grade service.

3. Channel 255B can be allotted to Monroeville, Indiana, in compliance with the Commission's minimum distance separation requirements and can be used at Station WBYR(FM)'s present transmitter site.[1] Channel 255B at Van Wert and Monroeville is mutually exclusive since the communities are located less than the required 241 kilometer separation for co-channel Class B allotments. Therefore, in accordance with Section 1.420 of the Commission's Rules, we will not accept competing expressions of interest in use of the channel at Monroeville or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

4. We believe the public interest would be served by proposing the reallotment of Channel 255B from Van Wert, Ohio, to Monroeville, Indiana, since it could provide the community with its first local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Monroeville, Indiana	--	255B
Van Wert, Ohio	255B	--

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **February 12, 1990,** and reply comments on or before **February 27, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Peter A. Rohrbach, Esq.
Marissa G. Repp
Christy J. Dittrick, Esq.
Hogan & Hartson
Columbia Square
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(Counsel to petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 40-57-14 and West Longitude 84-53-07.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-582

In the Matter of

Amendment of Section 73.202(b), RM-7066
Table of Allotments,
FM Broadcast Stations.
(Archbold, Ohio)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 5, 1989; Released: December 20, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Nobco, Inc. (petitioner) requesting the substitution of Channel 241A for Channel 240A at Archbold, Ohio, and the modification of its license for Station WMTR-FM to specify the alternate Class A channel.

2. Petitioner states that the substitution of channels will enable Station WMTR-FM to increase power above its present three kilowatts without changing its present transmitter site. Further, it states that the change in frequency could alleviate interference allegedly being received from recently authorized Station WRED, Channel 239A, at Gibsonburg, Ohio. Although petitioner acknowledges that there is no short-spacing between its Station WMTR-FM and WRED, it alleges that the Gibsonburg station is causing interference, in some instances, within its predicted 1 mv/M contour.

3. Channel 241A can be allotted to Archbold in compliance with the Commission's minimum distance separation requirements and can be used at the transmitter site specified in its outstanding construction permit (BPH-880429MA).[1] Canadian concurrence is required since Archbold is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

4. We believe the proposal warrants consideration. Therefore, we will propose the substitution of Channel 241A for Channel 240A at Archbold, Ohio, since it could permit Station WMTR-FM to increase power and expand its coverage area. As requested, we also propose to modify petitioner's license to specify the alternate Class A channel. We will not accept competing expressions of interest in use of Channel 241A at Archbold.

5. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Archbold, Ohio	240A	241A

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **February 12, 1990,** and reply comments on or before **February 27, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

William S. Reyner, Jr., Esq.
Katherine A. Schoff, Esq.
Hogan & Hartson
Columbia Square
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(Counsel to petitioner)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 41-33-29 and West Longitude 84-11-08.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-581

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Zanesville and South Zanesville, Ohio) RM-7067

NOTICE OF PROPOSED RULE MAKING

Adopted: December 5, 1989; Released: December 20, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Christian Voice of Central Ohio (petitioner), licensee of Station WCVZ(FM), Channel 224A, Zanesville, Ohio. Petitioner requests the substitution of Channel 224B1 for Channel 224A, the reallotment of Channel 224B1 to South Zanesville, Ohio, as the community's first local FM service, and the modification of its license for Station WCVZ(FM) accordingly. Petitioner states that it will apply for the channel, if allotted.

2. Petitioner states that the modification of its license to specify Channel 224B1 at South Zanesville would comply with Section 1.420 of the Commission's Rules which permits the modification of a station's license to specify a higher class of channel and/or a new community of license without affording other interested parties an opportunity to file competing expressions of interest. *See, Modification of FM and TV Authorizations to Specify a New Community of License*, 3 FCC Rcd 6890 (1988). It submits that the allotment of Channel 224B1 would provide South Zanesville, with a 1980 U.S. Census population of 1,749 persons, with its first local FM service. Zanesville, according to petitioner, would still retain local service from two fulltime aural stations as well as a local television station. Further, it states that the increase in power will enable Station WCVZ(FM) to serve a larger area and population than now possible. In this connection, it notes that the limited area which will no longer be encompassed within its 1 mV/m contour will continue to receive service from at least two other fulltime stations.

3. We believe the public interest would be served by proposing the substitution of Channel 224B1 for Channel 224A and the reallotment of Channel 224B1 to South Zanesville, since it could enable the community to receive its first local FM service and permit Station WCVZ(FM) to expand its coverage area. As requested, we also propose to modify petitioner's license for Station WCVZ(FM) to specify the higher powered channel at the new community. In accordance with Section 1.420 of the Commission's Rules, we will not accept competing expressions of interest in use of the channel at South Zanesville or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

4. Channel 224B1 can be allotted to South Zanesville in compliance with the Commission's minimum distance separation requirements with a site restriction of 21.1 kilometers (13.1 miles) south to avoid a short-spacing to Station WDJQ, Channel 223B, Alliance, Ohio, and Station WQEL, Channel 224A, Bucyrus, Ohio.[1] Canadian concurrence is required since South Zanesville is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

5. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

	Channel No.	
City	Present	Proposed
South Zanesville, Ohio	--	224B1
Zanesville, Ohio	224A, 273B	273B

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **February 12, 1990,** and reply comments on or before **February 27, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Eric S. Kravetz, Esq.
Ward & Mendelsohn, P.C.
1100 - 17th Street, N.W., Suite 900
Washington, D.C. 20036
(Counsel to petitioner)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by

the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 39-42-53 and West Longitude 82-04-02.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-580

In the Matter of

Amendment of Section 73.202(b),	RM-6977
Table of Allotments,	RM-7177
FM Broadcast Stations.	
(Elkins, West Virginia;	
Mountain Lake Park,	
and Westernport,	
Maryland)	

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: December 5, 1989; Released: December 20, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration are two mutually exclusive petitions for rule making. The first petition filed by Marja Broadcasting Corporation ("Marja"), licensee of Station WVHT(FM), Channel 257A at Elkins, West Virginia, seeks the substitution of Channel 255B1 for Channel 257A at Elkins, and the modification of its license to specify the higher powered frequency (RM-6977). In addition, Marja suggests the substitution of Channel 283A for Channel 255A at Mountain Lake Park, Maryland, and the modification of the construction permit of Station WKHJ(FM) at Mountain Lake Park to specify operation on the new frequency, in order to permit the upgrade at Elkins. The second petition, filed by Ernest F. Santmyire ("Santmyire"), permittee of Station WWPN(FM), Channel 224A, at Westernport, Maryland, requests the substitution of Channel 283A for Channel 224A at Westernport, and the modification of his construction permit to specify the new channel (RM-7177).

2. Marja submits information in support of its proposal to provide Elkins and the surrounding area with expanded FM coverage. Santmyire states that the proposed channel substitution at Westernport will permit Station WWPN(FM) to increase its power to 6 kW and serve a greater number of listeners within a larger coverage area.

3. We consider the proposals mutually exclusive due to the proposed use of Channel 283A at either Mountain Lake Park or Westernport. Based on the expressed desire of Marja and Santmyire to provide improved FM coverage areas to their respective communities and the surrounding areas, we shall set forth optional plans to either accomplish an upgrade at Elkins or the channel substitution at Westernport. Therefore, as a result of our preliminary analysis, the proposals must be considered on a comparative basis. In order to make a determination as to which of the two proposals should be preferred, we request that the proponents further demonstrate why its proposal should prevail. In this regard, the parties should be guided by the criteria set forth in the *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982). In particular, both parties should submit a gain area showing indicating the population and square kilometers of the increased area to be served. *See e.g., Greenup, Kentucky and Athens, Ohio*, 2 FCC Rcd 4319 (1987), *on recon.*, 4 FCC Rcd 3843 (1989).

4. Channel 283A can be substituted for Channel 224A in compliance with the Commission's minimum distance separation requirements at the site specified by Santmyire.[1]

5. Channel 255B1 can be allotted to Elkins in compliance with the Commission's minimum distance separation requirements at the site proposed by Marja,[2] if the channel substitution is made at Mountain Lake Park. [3] Therefore, we are herein issuing a *Show Cause Order* to Roger Lee Ruff, the licensee of Station WKHJ(FM) at Mountain Lake Park, seeking comments as to why his license should not be modified to specify operation on Channel 283A in lieu of Channel 255A.

6. Since the Elkins proposal is located within the protected areas of the National Radio Astronomy Observatory "Quiet Zone" at Green Bank, West Virginia, Marja will be required to comply with the notification requirement of Section 73.1030(a) of the Commission's Rules. Marja states that it has made the preliminary notification.

7. As requested, we shall propose to modify the license of Station WVHT(FM) at Elkins to specify operation on Channel 255B1 in lieu of Channel 257A, or to modify the construction permit of Station WWPN(FM) at Westernport to specify operation on Channel 283A in lieu of Channel 224A. However, in accordance with Section 1.420(g) of the Commission's Rules we shall not accept competing expressions of interest nor require that Marja demonstrate the availability of an additional equivalent channel at Elkins.

8. Commission policy requires that Station WKHJ(FM) be reimbursed for the reasonable costs of changing frequencies. Marja states its willingness to reimburse Station WKHJ(FM) for its reasonable costs incurred in changing frequencies.

9. Accordingly, we seek comments on the optional proposals to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following communities:

City	Channel No. Present	Proposed
OPTION I		
Elkins, West Virginia	237A, 257A	237A,[4] 255B1
Mountain Lake Park, Maryland	255A	283A
OPTION II		
Westernport, Maryland	224A	283A

10. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Roger Lee Ruff, licensee of Station WKHJ(FM), Channel 255A, Mountain Lake Park, Maryland, SHALL SHOW CAUSE why his license should not be modified to specify operation on Channel 283A in lieu of Channel 255A.

11. Pursuant to Section 1.87 of the Commission's Rules, Roger Lee Ruff, may, not later than **February 12, 1990** file a written statement showing with particularity why his license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Roger Lee Ruff to furnish additional information. If Roger Lee Ruff raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Roger Lee Ruff, will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

12. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following: Roger Lee Ruff, 1002 Pittsburg Avenue, Mountain Lake Park, MD 21550.

13. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

14. Interested parties may file comments on or before **February 12, 1990,** and reply comments on or before **February 27, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

J. Dominic Monahan, Esq.
Dow, Lohnes, & Albertson
1255 Twenty-Third Street, N.W.
Suite 500
Washington, D.C. 20037
(Counsel for Marja Broadcasting Corporation)

Howard M. Liberman, Esq.
Jonathan V. Cohen, Esq.
Arter & Hadden
1919 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20006
(Counsel for Ernest F. Santmyire)

15. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

16. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in

reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The coordinates are 39-31-22 and 78-58-26. Santmyire wishes to relocate its present transmitter site in order to accomplish the channel substitution. The proposed site is 7.3 kilometers (4.5 miles) northeast of Westernport.

[2] Marja expressed its desire to relocate its station's current transmitter site to a site 0.9 kilometers (0.6 miles) west of Elkins. The coordinates are 38-55-25 and 79-51-33.

[3] Channel 283A can be used at the current transmitter site of Station WKHJ(FM). The coordinates are 39-24-37 and 79-17-15.

[4] In a separate proceeding the Commission is currently considering a proposal to substitute Channel 234B1 for Channel 237A at Elkins. *See* the *Notice of Proposed Rule Making,* 4 FCC Rcd 4972 (1989), in MM Docket No. 89-283.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-613

In the Matter of

Amendment of Section 73.202(b),	RM-6483
Table of Allotments,	RM-6712
FM Broadcast Stations.	
(Dickson, Tennessee; Benton and Calvert City, Kentucky)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 5, 1989; Released: December 20, 1989

By the Chief, Allocations Branch:

1. At the request of American Communications, Inc. (petitioner), the Commission considers herein the Notice *of Proposed Rule Making*, 4 FCC Rcd 780 (1989), proposing the substitution of Channel 273C1 for Channel 273C2 at Dickson, Tennessee, and the modification of its license for Station WQZQ(FM) at Dickson to specify operation with the higher class. In addition the *Notice* directed Purchase Broadcasting Co. ("Purchase"), licensee of Station WCBL-FM, Channel 272A at Benton, Kentucky, to show cause why its license should not be modified to reflect Channel 256A in lieu of Channel 272A in order to accommodate the upgrade at Dickson. Purchase filed comments. Petitioner filed comments addressing Purchase's comments.[2] Jackson Purchase Communication ("Jackson") filed comments and a counterproposal suggesting the allotment of Channel 256A at Calvert City, Kentucky, as that community's first local FM service.[3] Petitioner filed reply comments in response to Jackson's counterproposal demonstrating the availability of Channel 239A at Calvert City. Purchase also filed reply comments to the petitioner's comments.

2. Purchase, in its comments, seeks reasonable assurance from the petitioner that it will adhere to the Commission's reimbursement requirements for the proposed changes to Station WCBL-FM. Purchase argues that because it does not know the financial status of the petitioner, "it is unfair" to be forced to act as a "banker" to the petitioner. Therefore, Purchase urges the petitioner to establish, "in advance and into an escrow fund, sufficient sums" to cover its allowable expenses. Purchase further urges the Commission to impose such a requirement on the petitioner. Purchase states that it is "ready to enter into such an equitable arrangement with" the petitioner.

3. In its comments, petitioner reaffirms its interest in the proposal. Petitioner states that it is fully and unequivocally committed to reimbursing Purchase in accordance with *Circleville, Ohio*, 8 FCC 2d 159 (1967). Petitioner further states that it intends to follow through on its commitment to Purchase since its upgrade relies on the changes to Purchase's station.

4. We have carefully considered the information before us and conclude that the public interest would be served by the allotment of Channel 239A to Calvert City, Kentucky, and substitution of Channel 273C1 for Channel 273C2 at Dickson, Tennessee. Both channel allotments can be made in compliance with the Commission's minimum distance separation requirements. Channel 239A can be allotted to Calvert City, Kentucky, with a site restriction at least 12.1 kilometers (7.5 miles) northeast of the community.[4] Channel 273C1 can be allotted to Dickson as a substitute for Channel 273C2 at the petitioner's specified site, which is 14.4 kilometers (9.0 miles) north of the city, provided Channel 256A is substituted for Channel 272A at Benton, Kentucky.[5]

5. In accordance with Commission policy Station WCBL-FM at Benton is entitled to reimbursement for reasonable costs of changing its frequency by the petitioner, as the benefiting party. The extent of reimbursement is governed by the guidelines set forth in *Circleville, Ohio, supra*, and is generally left to the good faith negotiation of parties involved subject to Commission review in the event of disagreement. Petitioner has stated its willingness to fully comply with the reimbursement requirements. As for Purchase's request that the Commission require an escrow arrangement, we decline to do so. Certainly such an arrangement might provide a reasonable means for discharging the reimbursement obligation. *See Columbus, Nebraska*, 59 RR 2d 1185, 1186 (1986). However, there may well be other means for doing so consistent with the legitimate interests of the parties and the public. Except in instances where, unlike here, there is a factual basis for questioning a party's financial ability to reimburse, or where other unusual circumstances apply, these are matters best left to resolution by good faith negotiations between Commission licensees.

6. As requested, we are herein modifying the license of Station WQZQ(FM) at Dickson to specify operation on Channel 273C1 in lieu of Channel 273C2, pursuant to the provisions of Section 1.420(g) of the Commission's Rules. In order to accomplish the substitution at Dickson we are also modifying the license of Station WCBL-FM at Benton to specify operation on Channel 256A in lieu of Channel 272A. Purchase will not be required to effectuate the channel change until a construction permit has been issued to the petitioner for the upgraded facilities at Dickson. However, Purchase may effectuate the changes immediately, if it is confident that the petitioner will promptly comply with this *Order*. We trust that the petitioner and Purchase can arrive at a mutually acceptable agreement and the channel changes and reimbursement are promptly effectuated.

7. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 6, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, as follows:

City	Channel No.
Benton, Kentucky	256A
Calvert City, Kentucky	239A
Dickson, Tennessee	229A, 273C1

8. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of American Communications, Inc., for Station WQZQ(FM), Dickson, Tennessee, IS MODIFIED, to specify operation on Channel 273C1 in lieu of Channel 273C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

9. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Purchase Broadcasting, Co., for Station WCBL-FM, Benton, Kentucky, IS MODIFIED, to specify operation on Channel 256A in lieu of Channel 272A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in License BLH-7751 except the channel as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with License BLH-7751 except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

10. The window period for filing applications on Channel 239A at Calvert City, Kentucky, will open on **February 6, 1990,** and close on **March 8, 1990.**

11. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send a copy of this *Order* by Certified Mail, Return Recipt Requested to the following:

Purchase Broadcasting, Co.
P. O. Box 387
Benton, Kentucky 42025

12. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

13. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The community of Calvert City, Kentucky, has been added to the caption.

[2] Purchase's comments were filed approximately three weeks prior to the established comment period herein. Petitioner responded to those comments in its timely filed comments.

[3] Public Notice of the counterproposal was given on April 3, 1989, Report No. 1773.

[4] The restricted site coordinates for Channel 239A at Calvert City are 37-07-52 and 88-17-38. The restricted site will provide protection to Station WSM-FM, Channel 238C, Nashville, Tennessee, and Station WYMC-FM, Channel 240A, Wickliffe, Kentucky.

[5] The petitioner's specified site coordinates for Channel 273C1 at Dickson are 36-12-30 and 87-23-20. The restricted site is necessary to avoid a short spacing to Station WYCQ, Channel 275C1 at Shelbyville, Tennessee. The coordinates for Channel 256A at Benton are 36-51-30 and 88-20-13.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-579

In the Matter of

Amendment of Section 73.202(b), RM-7065
Table of Allotments,
FM Broadcast Stations.
(Big Rapids & Whitehall,
Michigan)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 5, 1989; Released: December 20, 1989

By the Chief, Allocations Branch:

1. The Commission has before it for consideration a petition for rule making filed by West Michigan Radio, Inc. (petitioner), proposing the substitution of FM Channel 272C3 for Channel 272A at Big Rapids, Michigan.[1] Petitioner also requests modification of its license for Station WAAQ(FM) to specify operation on the higher class channel.

2. Channel 272C3 can be allotted to Big Rapids, Michigan, in compliance with the minimum distance separation requirements of the Commission's Rules at petitioner's specified site.[2] To accommodate the new channel at Big Rapids, it would be necessary to delete Channel 273A at Whitehall, Michigan. Two applications are pending for the channel at Whitehall. [3] Petitioner has proposed the substitution of Channel 248A for Channel 273A at Whitehall. The proposed substitution of Channel 248A at Whitehall can be accomplished in compliance with the minimum distance separation requirements at the city reference coordinates.[4] The applicants for Channel 273A at Whitehall would be permitted to specify the new Class A channel and retain their cut off protection, since the channels are equivalent. Since Big Rapids and Whitehall, Michigan, are located within 320 kilometers (200 miles) of the U.S.-Canadian border, we shall request concurrence of the Canadian government for these allotments. We shall also propose to modify the license of Station WAAQ(FM), to specify operation on Channel 272C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. In order to provide a wide coverage area station for Big Rapids, Michigan, the Commission PROPOSES TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

City	Channel No. Present	Proposed
Big Rapids, Michigan	265A, 272A	265A, 272C3
Whitehall, Michigan	237A, 273A	237A, 248A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **February 12, 1990,** and reply comments on or before **February 27, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

John F. Garziglia
Pepper & Corazzini
1776 K Street, N.W.
Suite 200
Washington, D.C. 20006
(counsel for petitioner)

6. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND BY CERTIFIED MAIL, Return Requested, a copy of this ORDER to the following:

Pyramid Broadcasting, Inc.
1802 S. Fernandez Avenue
Arlington Heights,
Illinois 60005
(880915MY)

P & B Communications, Inc.
636 Riverview Court
Whitehall, Michigan 49461
(880915NP)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*; 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall

be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] West Michigan Radio, Inc., proposed assignee of Station WAAQ(FM), Big Rapids, filed this petition with the consent of the present licensee, James J. McCluskey.

[2] The coordinates for Channel 272C3 are 43-43-20 and 85-36-30.

[3] BPH-880915NP and 880915MY.

[4] The coordinates for Channel 248A are 43-24-24 and 86-20-42.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-541

In re Applications of

JUAN GALIANO (hereafter "Galiano")	File No. BPH-871028MA
JOSEPH BAHR (hereafter "Bahr")	File No. BPH-871028MB
GUILLERMO A. BONET (hereafter "Bonet")	File No. BPH-871029MH
RENACER BROADCASTERS CORPORATION (hereafter "RBC")	File No. BPH-871029MK
OCCIDENTAL BROADCASTING CORPORATION (hereafter "Occidental")	File No. BPH-871029MM

For Construction Permit
for a New FM Station in
Hormigueros, Puerto Rico
on Channel 291A (106.1 MHz).

HEARING DESIGNATION ORDER

Adopted: November 13, 1989; Released: December 20, 1989

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. *Galiano*. The Commission requires that if there will be five or more fulltime employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Galiano has filed a statement, it is deficient. Galiano has not listed examples of: (a) women's organizations, (b) employment services, (c) educational institutions, or (d) publications which will be used to effectuate the EEO program. Accordingly, Galiano will be required to file an amended EEO program with the presiding Administrative Law Judge, within 30 days of the release of this Order, or an appropriate issue will be specified by the Judge.

3. Bahr has indicated that it has not provided local notice of the filing of its application, as required by 47 C.F.R. § 73.3580(f). To avoid delay, we will waive 47 C.F.R. § 73.3564(c) on our own motion, and require Bahr to provide local notice of its application, if it has not already done so, and so inform the presiding Administrative Law Judge within 30 days of the release of this Order. *See Seattle Public Schools*, 103 FCC 2d 862, 868 (1986).

4. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicant below have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Bahr would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

5. RBC, Galiano and Occidental have petitioned for leave to amend their applications on the dates shown below. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Galiano	February 8, 1988
RBC	January 21, 1988; March 24, 1988; February 22, 1989
Occidental	January 11, 1988

6. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

7. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

8. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by Bahr would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

9. IT IS FURTHER ORDERED, That a grant of any of the subject applications is conditioned upon the resolution of the pending petition for reconsideration filed by Aurio Matos, licensee of Station WRFE(FM), Aguado, Puerto Rico, on September 14 1987, against the *Report and Order* in MM Docket No. D86-433 (RM-5477), released August 14, 1987, allocating Channel 291A to Hormigueros, Puerto Rico.

10. IT IS FURTHER ORDERED, That 47 C.F.R. § 73.3564(c) IS WAIVED to the extent indicated herein, and that Bahr shall file the amendment specified in paragraph 3 above, with the presiding Administrative Law Judge within 30 days of the release of this Order.

11. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Galiano shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

12. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

13. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Galiano, RBC, and Occidental ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

14. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

15. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

16. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] On June 20, 1988, Aurio Matos, licensee of station WRFE(FM), Aguado, Puerto Rico, filed an informal objection to the above-captioned applications pending the outcome of his petition for reconsideration filed with the Allocations Branch on September 14, 1987, against the *Report and Order* in MM Docket No. D86-433 (RM-5477), released August 14, 1987, allocating Channel 291A to Hormigueros, Puerto Rico. On July 6, 1988 Occidental filed an opposition to the objection. Accordingly, an appropriate condition will be specified below.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-540

In re Applications of

MAJOR-KEENE PARTNERSHIP (hereafter "MKP")	File No. BPH-870615MH
CSJ INVESTMENTS, INC. (hereafter "CSJ")	File No. BPH-870615MK
David H. Smith, Maureen L. Smith, James E Smith, James E. Spisiak, Patricia B. Spisiak d/b/a KEYS BROADCASTING SYSTEM (hereafter "KBS")	File No. BPH-870615MW
OCEAN FRONT RADIO LIMITED PARTNERSHIP (hereafter "Ocean Front")	File No. BPH-870615MZ
CONCH COMMUNICATIONS CORP. (hereafter "Conch")	File No. BPH-870615NA
SOUTH STAR COMMUNICATIONS, INC. (hereafter "South Star")	File No. BPH-870615ND
KEY WEST BROADCASTING COMPANY (hereafter "Key West")	File No. BPH-870615NE

For Construction Permit
for a New FM Station on
Channel 300C1 (107.9 MHz)
Key West, Florida

HEARING DESIGNATION ORDER

Adopted: November 13, 1989; Released: December 20, 1989

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Ocean Front*. Information before the Commission indicates that Ocean Front was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Oliver Springs, Tennessee	88-201
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Crawford, Georgia	88-294
Rocky Mount, North Carolina	88-299
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Beaumont, Texas	88-358
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433
Greenwood, Indiana	88-468
Harrison, Ohio	88-535

Identical issues were specified in each of these proceedings: whether or not Sonrise was a real party in interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant has dismissed its application rather than resolving these issues. These unresolved issues call into question Ocean Front's qualification to be a Commission licensee. Therefore, such issues will be specified and tried against Ocean Front in this proceeding.

3. *CSJ*. CSJ's application was originally filed on June 15, 1987. On June 26, 1989, and again with some further "minor modifications" on August 3, 1989, CSJ filed petitions for leave to amend its application. The accompanying amendments propose a new transmitter site on Sugarloaf Key in Monroe County, Florida.[1]

4. In the *Report and Order* in MM Docket No. 84-750, 50 Fed. Reg. 19936 (May 13, 1985), *recon. denied*, 50 Fed. Reg. 43157 (1985), the Commission adopted strict rules governing acceptance of amendments to applications for FM facilities. These rules provide that amendments which address the acceptability or grantability of an application may be filed as a matter of right any time prior to the expiration of the 30-day period triggered by the release of the Public Notice announcing that the subject application had been accepted for tender. 50 Fed. Reg. at 19941; *see also* 47 C.F.R. § 73.3522(a)(6). Once this period expires,

predesignation amendments "will be considered only upon a showing of good cause for late filing or pursuant to § 1.65 or § 73.3514" of our rules. 47 C.F.R. § 73.3522(a)(6).

5. CSJ's 30-day period for filing amendments, as a matter of right, began on August 4, 1987 and ended on September 4, 1987. The June 26, 1989 amendment proposing a site change was filed after this period. CSJ attempts to make a showing of good cause for the acceptance of the amendment by arguing that CSJ *understands* that the permittee of its present tower site is unable to build the tower because of environmental problems and that the property containing that site has been deeded to the United States as a national wildlife refuge. Therefore, CSJ contends that good cause exists for acceptance of the amendment because it cures a potentially disqualifying defect.

6. Upon review of this matter we find that CSJ has not established good cause for the acceptance of its amendment. CSJ amended to its present site, as a matter of right, on September 3, 1987. On June 26, 1989 and August 3, 1989, nearly two years later, CSJ is again proposing to change its transmitter site because of environmental problems. However, CSJ gives no indication as to when it first learned of the environmental problems affecting the tower and why it could not have notified the Commission and amended its application at an earlier date. Consequently, we believe CSJ has not acted with due diligence in trying to ascertain the tower's availability and the problems associated with the site. Moreover, CSJ has not provided any documentation to support its allegations that the tower will not be built and that the site has in fact been deeded to the United States as a national wildlife refuge. Therefore, based on the foregoing, CSJ has failed to establish good cause for acceptance of its June 26, 1989 and August 3, 1989 amendments. Accordingly, the amendments will be returned as untimely filed.[2]

7. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. CSJ, Ocean Front, South Star and Key West have not completed Item 4 correctly. CSJ's application gives a post office box drawer as the residence address for Jeff Hall. Ocean Front gives a post office box number as the residence address for Frank Dale Davidson. South Star did not list the applicant and the other required information for the applicant. Key West list a post office box number as the residence address for the applicant. Accordingly, CSJ, Ocean Front, South Star, and Key West must each submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days of the release of this Order.

8. On May 31, 1988, CSJ amended its application to show the addition of Mr. Jeff Hall as Secretary/Treasurer of CSJ. However, the amendment did not contain Mr. Hall's legal qualifications (i.e., citizenship, other media interests, if any) as required by Section II, Item II, Form 301. Accordingly, CSJ will be required to file a further clarifying amendment with the presiding Administrative Law Judge within 30 days of the release of this Order.

9. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicant below have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Key West would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

10. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although the following applicants have filed such statements, they are deficient in the manner described below. Accordingly, each applicant listed below will be required to file an amended EEO program with the presiding Administrative Law Judge, within 30 days of the release of this Order, or an appropriate issue will be specified by the Judge.

APPLICANTS	DEFICIENCIES
MKP	Failed to identify specific sources of recruitment specializing in women candidates.
KBS	Failed to identify specific sources of recruitment specializing in women and minority candidates.
South Star	Failed to list name of person who will be responsible for implementation of EEO program; Failed to identify specific sources of recruitment specializing in women and minority candidates; Failed to identify examples of employment referral services to be utilized; Failed to identify educational institutions with substantial women and minority enrollments from which the applicant intends to recruit employees; Failed to identify publications the applicant will utilize in attracting women and minorities; Failed to identify the school(s) or other beneficiaries as well as the proposed form of assistance the applicant will provide in its proposed training program for minorities

and women interested in entering the broadcast field.

11. Conch proposes to locate its antenna at a height of 80 meters above ground level on a new tower which it intends to construct. Our study indicates, however, that this proposal may significantly exceed the frequency radiation guidelines under 47 C.F.R. § 1.1307(b). Accordingly, Conch will be required to amend its application, within 30 days of the date of this Order, to demonstrate compliance with the RF radiation guidelines. Conch must submit a detailed study based upon OST Bulletin No. 65, October 1985 entitled "Evaluating Compliance with FCC Guidelines for Human Exposure to Radiofrequency Radiation." Note also that all calculations must be made 2 meters above the ground. This study must include the cumulative effect of the proposed operation and any co-located or nearby RF sources. If a fence is to be built, Conch must give the distance from the base of the tower to the fence. Additionally, CSJ's proposed transmitter site is located on property that may become a national wildlife preserve. Thus, since the proposals of CSJ and Conch may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, CSJ and Conch will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. Accordingly, CSJ and Conch will be required to file within 30 days of the release of this Order an environmental assessment with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

12. CSJ, Ocean Front, and South Star each propose to locate on a tower structure previously approved by the Commission and the Federal Aviation Administration. Stations WAIL and WOZN, both of Key West, Florida, hold construction permits to construct this tower. Commission records indicate that this tower is approved for 319.4 meters above ground level (AGL) and 319.7 meters above mean sea level (AMSL). CSJ's application specifies heights of 320 meters AGL and 320 meters AMSL, while South Star's tower sketch lists the tower heights as they are contained in th Commission's records. Ocean Front lists the tower heights as 319 meters AGL/319 meters AMSL. Because these applicants clearly propose to locate on an "existing" tower of a Commission licensee, and because specific reference is made to this tower in various places in the applications in question, the staff could, "drawing on the applications as a whole," confidently verify actual tower heights taking official notice of the tower heights as found in the Commission's files for the licensed co-located facilities. Accordingly, CSJ, Ocean Front and South Star were found to be acceptable for filing; however, these applicants shall be required to file corrective amendments to their applications with the presiding Administrative Law Judge within 30 days of the release of this Order.

13. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last day for filing minor amendments as of right. Under 47 C.F.R. § 1.65 the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	DATE AMENDMENTS FILED
CSJ	May 31, 1988
Ocean Front	June 24, 1988, November 1, 1988 May 15, 1989; September 13, 1989

14. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

15. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

16. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Sonrise Management Services, Inc. is an undisclosed party to the application of Ocean Front.

2. To determine whether Ocean Front's organizational structure is a sham.

3. To determine, from the evidence adduced pursuant to Issues 1 and 2 above, whether Ocean Front possesses the basic qualifications to be a licensee of the facilities sought herein.

4. If a final environmental impact statement is issued with respect to CSJ and Conch in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

5. To determine whether there is a reasonable possibility that the tower height and location proposed by Key West would constitute a hazard to air navigation.

6. To determine which of the proposals would, on a comparative basis, best serve the public interest.

7. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

17. IT IS FURTHER ORDERED, That the June 26, 1989 and August 3, 1989 amendments filed by CSJ ARE HEREBY RETURNED as untimely filed.

18. IT IS FURTHER ORDERED, That KBS' July 24, 1989 opposition to CSJ's petition for leave to amend IS DISMISSED AS MOOT.

19. IT IS FURTHER ORDERED, That CSJ, Ocean Front, South Star and Key West shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days of the release of this Order.

20. IT IS FURTHER ORDERED, That CSJ shall submit an amendment in accordance with paragraph 8 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

21. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

22. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, and in accordance with paragraph 10 hereinabove, MKP, KBS and South Star shall submit Section VI information in accordance with the requirements of 47 C.F.R. § 73.2080(c) to the presiding Administrative Law Judge.

23. IT IS FURTHER ORDERED, That in accordance with paragraph 11 hereinabove, CSJ and Conch shall submit the environmental assessments required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

24. IT IS FURTHER ORDERED, That CSJ, Ocean Front and South Star shall each submit an amendment in accordance with paragraph 12 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

25. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by CSJ and Ocean Front ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

26. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

27. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

28. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] We note that KBS has filed an opposition to CSJ's petition for leave to amend, and CSJ has filed a reply thereto. Based on our conclusions set forth above, KBS' opposition will be dismissed as moot.

[2] We note, however, that although CSJ has failed to adequately document its contention concerning the wildlife refuge, we will, out of an abundance of caution, request further environmental assessment in paragraph 11, below.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-539

In re Applications of

VALUE RADIO CORPORATION (hereafter "Value")	File No. BPH-870617MI
DONALD G. JONES (hereafter "Jones")	File No. BPH-870617MJ
MICHAEL DEAN d/b/a LOMIRA BROADCASTING COMPANY (hereafter "Lomira")	File No. BPH-870618MD

For Construction Permit
for a New FM Station on
Channel 294A, in Lomira,
Wisconsin

HEARING DESIGNATION ORDER

Adopted: November 13, 1989; Released: December 20, 1989

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Value.* On July 24, 1989, Value filed an amendment to update the information in its application to reflect changes in ownership and other broadcast interests of several of its principals. The amendment, however, is incomplete as it does not contain pages 4 and 5 of Section II (Items 5-10) pertaining to Gayle Olson's, Thomas M. Kushak's, Charles D. Mefford's, Joseph D. Mackin's and Richard J. Trautschold's legal qualifications. Accordingly, Value will be required to submit this information in an amendment to the presiding Administrative Law Judge within 30 days of the release of this Order.

3. Value has petitioned for leave to amend its application on March 4, 1988, January 9, 1989 and July 24, 1989. Jones has petitioned for leave to amend his application on March 9, 1988 and January 27, 1989. The accompanying amendments were filed after September 21, 1987, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

4. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and Lomira have been unsuccessful. Accordingly, since no determination has been received as to whether the antennas proposed by Lomira would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

5. The Lomira applications being considered in this proceeding conflict with a pending Rule Making proceeding to modify the frequency of WYUR-FM, Ripon, WI from Channel 241A to Channel 294A. At the time that the Lomira applications were filed, a petition for Rule Making had not been filed. Consequently, the Lomira applications met all the spacing criteria of 47 C.F.R. § 73.207(a) and were accepted for filing. Accordingly, we will designate these applications for hearing. However, the construction permit issued to any of these applicants will be conditioned upon the outcome of the WYUR-FM, Ripon, WI Channel 294A Rule Making proceeding.

6. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

7. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

8. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by Lomira would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

9. IT IS FURTHER ORDERED, That Value shall submit an amendment to the presiding Administrative Law Judge within 30 days of the release of this Order which contains the information required by pages 4 and 5 of Section II of FCC Form 301.

10. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by the following applicants are GRANTED, and the corresponding amendments are accepted to the extent indicated herein: Value (3/4/88) (1/9/89) (7/24/89) Jones (3/9/88)i (1/27/89).

11. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

12. IT IS FURTHER ORDERED, That the ultimate construction permit issued in the Lomira, Wisconsin proceeding will be conditioned upon whatever action is taken in the WYUR-FM, Ripon, WI Channel 294A Rule Making proceeding.

13. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

14. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

15. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-538

In re Applications of

MID-COAST RADIO, INC. (hereafter "Mid-Coast")	File No. BPH-870921MA
U.S. MEDIA CO. (hereafter "U.S. Media")	File No. BPH-870922MB
JAMES AND CLAUDIA HARDEN (hereafter "Harden")	File No. BPH-870922MG
SAN LUIS WIRELESS, A CALIFORNIA LIMITED PARTNERSHIP (hereafter "San Luis")	File No. BPH-870922MH
LISA ANN WAYNE (hereafter "Wayne")	File No. BPH-870922MJ
CLAMSHELL COMMUNICATIONS CORP. (hereafter "Clamshell")	File No. BPH-870922MN
COAST BROADCASTING, INC. (hereafter "CBI")	File No. BPH-870922MO
E. DAVID LEE (hereafter "Lee")	File No. BPH-870922MP
NATHAN BROADCASTING CORPORATION (hereafter "Nathan")	File No. BPH-870922MQ
BARKER COMMUNICATIONS LTD. (hereafter "Barker")	File No.BPH-870922MU
Patricia J. Jacobsen d/b/a PEACOCK BROADCASTING (hereafter "Jacobsen")	File No. BPH-870922MF (PREVIOUSLY DISMISSED)

For Construction Permit
for a New FM Station on
Channel 246B1 (97.1 MHz)
in San Luis Obispo, California

HEARING DESIGNATION ORDER

Adopted: November 13, 1989; Released: December 20, 1989

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. *Jacobsen.* Jacobsen's application was returned by letter dated January 17, 1989 because her proposal was short-spaced by 1.5 kilometers to the licensed facilities of co-channel Station KSEQ(FM), Visalia, California and, therefore, had required a waiver of the spacing requirements of 47 C.F.R. § 73.207. Jacobsen failed to provide the requisite showing that no fully-spaced or lesser short-spaced sites exist and that grant of the requested waiver would be in the public interest. Jacobsen's failure led to denial of the waiver and return of the application.

3. On February 15, 1989, Jacobsen timely filed a petition for reconsideration of the return of her application. She argues therein that the short spacing involved in her application was *de minimis* and that all she needed to show was that her proposal was in the public interest. To support her argument Jacobsen cites *North Texas Media, Inc.*, 778 F.2d 28 (D.C. Cir. 1985) and *Kenter Broadcasting Co.*, 62 RR 2d 1573 *aff'd* 816 F.2d 8 (D.C. Cir. 1987).

4. Commission policy does not permit waiver of the minimum distance separation requirements unless no fully-spaced or lesser short-spaced sites exist. *See Donovan Burke*, 104 FCC 2d 843 (1980); *Megamedia*, 67 FCC 2d 1527 (1978). In this proceeding, 10 out of the 11 applicants specified fully-spaced sites. However, Jacobsen has raised no question about the availability or technical feasibility of these sites. Moreover, the Commission is aware of no case, and *Kenter* does not include any, where the *de minimis* exception was applied and a waiver granted in a situation when one applicant specifies a short-spaced site and the others choose fully-spaced sites. Therefore, it would be difficult to grant such a waiver in the public interest when other applicants propose to provide the same service without violating any Commission rule. Accordingly, Jacobsen's petition for reconsideration will be denied.

5. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Mid-Coast, CBI, and Nathan have not completed Item 4 correctly. Mid-Coast and CBI did not list the applicant and the other required information pertaining to the applicant. Nathan's application gives a post office box number as the residence address for the applicant and for one of its principals, Nathaniel J. Montague. Accordingly, Mid-Coast, CBI, and Nathan must each submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days of the release of this Order.

6. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301 and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Nathan has filed such a statement, it is deficient. Nathan has failed to identify the proposed form of assistance the applicant will provide in its training program for minorities and women interested in entering the broadcast field. Accordingly, Nathan will be required to file an amendment with the presiding Administrative Law Judge within 30 days of the release of this Order.

7. U.S. Media is the licensee of Station KPGA-FM in Pismo Beach, California.[2] The 70 dBu contour of KPGA-FM would overlap with the 70 dBu contour of U.S. Media's instant proposal, thus triggering a potential duopoly problem under Section 73.3555 of the Commission's Rules. U.S. Media has indicated its intent, however, to terminate its relationship with Station KPGA-FM in the event of the grant of the referenced application. Accordingly, an appropriate condition will be specified below.

8. Donald E. and Judith M. Pummill, principals in San Luis, are each a 10% owner and general partner in Dellar-Davis Broadcasting, the licensee of radio stations KPRL-AM and KDDB-FM in Paso Robles, California. The 70 dBu contour of KDDB-FM would overlap with the 70 dBu contour of San Luis' instant proposal, thus triggering a potential duopoly problem under Section 73.3555 of the Commission's Rules. The Pummills have indicated, however, their intent to terminate their relationship with Stations KPRL-AM and KDDB-FM in the event of the grant of the referenced application. Accordingly, an appropriate condition will be specified below.

9. An engineering study indicates that the proposals of Mid-Coast and Clamshell would exceed the ANSI guidelines for human exposure to radio frequency (RF) radiation as outlined in OST Bulletin No. 65 (October 1985). Consequently, we are concerned that Mid-Coast and Clamshell may have failed to comply with the newly revised environmental criteria set forth in the Report and Order in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). Under the newly revised rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in the newly added 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in the newly revised 47 C.F.R. § 1.1311. 47 C.F.R. § 1.1307 states that an EA must be prepared if the proposed operation would cause exposure of workers or the general public to levels of RF radiation exceeding specific standards. Since Mid-Coast and Clamshell's proposal may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, the applicants will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. This study must include the cumulative effects of the proposed operation and all nearby RF sources. If a fence is to be built the applicants must give the distance from the base of the tower to the fence. Accordingly, Mid-Coast and Clamshell will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

10. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicant below have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by San Luis would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

11. The applicants below have petitioned for leave to amend their applications of the dates shown. The accompanying amendments were filed after the last day for filing minor amendments as of right. Under 47 C.F.R. § 1.65 the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	DATE AMENDMENTS FILED
U.S. Media	April 26, 1989
Harden	April 19, 1988; March 11,1988
San Luis	January 19, 1988
Clamshell	July 6, 1988
Nathan	April 1, 1988
Barker	February 2, 1989; April 18, 1988

12. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

13. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

14. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to Mid-Coast and Clamshell in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposals are consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

2. To determine whether there is a reasonable possibility that the tower height and location proposed by San Luis would constitute a hazard to air navigation.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

15. IT IS FURTHER ORDERED, That the petition for reconsideration filed on February 15, 1989 by Patricia J. Jacobsen d/b/a Peacock Broadcasting IS DENIED.

16. IT IS FURTHER ORDERED, That Mid-Coast, CBI, and Nathan shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days of the release of this Order.

17. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Nathan shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

18. IT IS FURTHER ORDERED, That in the event of a grant of U.S. Media's application, it will be ordered to divest itself of all interests in and sever all connections with Station KPGA-FM, Pismo Beach, California, prior to the commencement of program test authority.

19. IT IS FURTHER ORDERED, That, in the event of grant of San Luis' application, Donald E. and Judith M. Pummill will be ordered to divest themselves of all interests in and sever all connections with Stations KPRL-AM and KDDB-FM, Paso Robles, California, prior to the commencement of program test authority.

20. IT IS FURTHER ORDERED, That in accordance with paragraph 9 hereinabove, Mid-Coast and Clamshell shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

21. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

22. IT IS FURTHER ORDERED, That the petition for leave to amend filed by U. S. Media, Harden, San Luis, Clamshell, Nathan and Barker ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

23. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

24. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

25. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] On March 1, 1989, FM San Luis Obispo Limited Partnership (BPH-870922MA) requested dismissal of its application. The request was voluntary and in accordance with our requirements governing such matters. Accordingly, the application was dismissed by Commission letter dated May 10, 1989.

[2] U. S. Media is proposing to side-mount its antenna on KPGA's tower.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 20, 1989

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON US WEST'S PETITION FOR WAIVER OF EIGHT - MONTH LIMITATION FOR VOICE STORAGE MARKET TRIAL
CC Docket 88-616

On November 13, 1989, US West, Inc. (US West) filed a petition for waiver of the Commission's standard eight-month period for conducting enhanced service market trials. US West is currently conducting a market trial of its voice storage service, pursuant to the Commission's Market Trial Waiver Order (4 FCC Rcd 1266 (1989)). US West states that this market trial is currently scheduled to end on February 16, 1990, and requests that the Commission allow it an additional four months, through June 16, 1990, to complete the trial.

US West states that with its trial, it hoped to maximize the availability of new enhanced services to the public. As a result, US West has focused its marketing efforts on businesses that have not traditionally used audiotex services. US West states that it has not yet secured commitments from a sufficient number of businesses to allow a meaningful market trial. Accordingly, US West requests additional time to familiarize potential users with the benefits of the service and attract more participants.

Interested parties should file comments on this petition by **January 10, 1990,** and reply comments by **January 24, 1990,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: International Transcription Services, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. US West's petition is available for inspection and copying, during normal business hours, in the FCC's Dockets Branch (Room 239), 1919 M Street, N.W., Washington, D.C. 20554. Copies of US West's petition also can be obtained from ITS at (202) 857-3800.

For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMTEL CORPORATION,
Complainant,

v. File No. E-87-38

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,
Defendant.

MEMORANDUM OPINION AND ORDER

Adopted: December 8, 1989; Released: December 13, 1989

By the Commission:

1. This matter is before us on remand, at our request, from the United States Court of Appeals for the Tenth Circuit.[1] In our prior order,[2] we denied Amtel's Application for Review of an order of the Chief, Common Carrier Bureau which granted Mountain States' Motion to Dismiss this matter. [3] We vacate our prior order and, for the reasons set forth below, we grant Amtel's Application for Review but deny its complaint on the merits.

I. BACKGROUND

2. In its complaint, Amtel alleged that Mountain States had improperly interpreted its Tariff F.C.C. No. 1, Sec. 6.7.7, relating to the calculation of access charges for interstate usage. That tariff provides that Mountain States will calculate certain access charges based on an assumed number of minutes if it does not have actual use figures. Because several end offices serving Amtel lacked equipment to measure actual minutes of usage, Mountain States applied the flat-rate surrogate to calculate Amtel's access charges in those offices. The sole argument in Amtel's complaint was that it was improper for Mountain States to interpret its tariff to say that the measurement capability had to exist in its end office. Amtel argued that if the customer's own equipment had measurement capability the customer should be allowed to provide the data for purposes of calculating access charges. In its Order, the Bureau dismissed Amtel's complaint on the ground that the issue it raised had been decided in the Commission's *Access Charge* decisions.[4]

II. AMTEL' S CONTENTIONS

3. Amtel asserts three reasons to reverse the Bureau's Order. It first claims that the Chief of the Common Carrier Bureau exceeded his delegated authority by acting on the issue presented by this complaint. Amtel also alleges that the Bureau Chief erred by misapplying or misinterpreting the Commission's policy on the use of assumed minutes for end offices with no measurement capability. It claims that this policy was based upon a concern that exchange carriers be appropriately compensated for the use of their facilities in congested end offices but it did not cover the small end offices at issue here where there simply is not enough traffic to approach the assumed usage level.

4. Finally, Amtel also contends that the Bureau Chief erred by not convening an evidentiary hearing before an administrative law judge prior to acting on its complaint. In support of this assertion, Amtel cites to the statement contained in paragraph 5 of the *Bureau Order*, "It is clear that no evidence has been presented in this proceeding to call this Commission precedent into question." Amtel claims that the Bureau erred because it was not afforded the opportunity to present such evidence in a hearing before an administrative law judge.

III. DISCUSSION

5. Our review of the *Access Charge* decisions and the arguments raised by Amtel in this proceeding leads us to conclude that Mountain States' interpretation and application of its tariff was reasonable and fully in accord with our existing access charge policy. Thus, we deny Amtel's complaint.

6. We find Mountain States' interpretation of its tariff reasonable. Mountain States developed the tariff in response to our rulings in the *Access Charge* proceeding. Our ultimate goal in that proceeding was to have all access charges computed on a time-used basis. This will be possible only when there is a universal measurement capability, which will happen as exchange carriers upgrade the equipment in their end offices.[5] Until then we have struck a balance that we believe is fair to both customers and carriers -- we have specified a surrogate number of minutes to be used for computing access charges if actual figures are not available. In considering this balance, we assumed, though we did not specifically require, that measurements for computing access charges would be done in the exchange carrier end office. For example, we stated:

> we have permitted exchange carriers without measurement capability in their end-offices to bill . . . on a flat-rate basis.

Fourth Reconsideration Order, 102 FCC 2d at 861. It is reasonable for Mountain States to make the same assumption in interpreting its tariff.

7. The Bureau correctly concluded that Mountain States' interpretation of its tariff was consistent with our access charge policies. We have permitted exchange carriers to use surrogate charges as a transitional measure. We made no exception for new entrants. In fact, we recognized that use of the flat-rate surrogate might disadvantage new entrants whose usage levels might not be as high as the assumed level, but concluded that "[a]ny minimal disadvantage that new entrants might experience is outweighed by the administrative costs that carriers would be likely to incur." *Second Reconsideration*, 97 FCC 2d at 861-62.[6] Similarly, we made no exception for small end offices. We chose the flat-rate surrogate as an estimate of average usage in end offices without measurement capability. As such, it would make no sense to exclude some long distance carriers and/or end offices.

8. Amtel has not presented any persuasive reasons for permitting long distance carriers to provide their own measurements of minutes of use for calculating access charges in these circumstances. Amtel claims, for example, that use of the surrogate places it at a competitive disadvantage versus Mountain States. But, Amtel does not compete with Mountain States for interstate long distance service. In any event, we do not think it would be consistent with our flat-rate surrogate policy to permit any long distance carrier, at its option, to provide its own usage data. We chose the surrogate figure as an average for the industry so that, on balance, long distance carriers would not be overcharged and exchange carriers would not be under or overcompensated. If we were to permit long distance carriers to have the option to provide their own data, as Amtel suggests, presumably those below the average would provide data while those above would not. Such a policy could place the exchange carriers at financial risk. In addition, Amtel has presented no new information that alters our conclusion that use of the flat-rate surrogate poses only a minimal disadvantage for new entrants.[7]

9. As to Amtel's last contention, we find no error on the part of the Bureau Chief in not convening an evidentiary hearing before an administrative law judge. Despite Amtel's assertion in its Application for Review, the questions presented by Amtel's complaint were legal rather than factual.[8] It is clear that the parties had ample opportunity to submit written pleadings and to extensively brief the legal issues raised.[9] Amtel has not identified a single fact that was in controversy and which could lead to a finding in its favor. Section 208 does not require a trial-type hearing, and the Commission has broad discretion to forego such a hearing where it "has been provided with sufficient information upon which to base its decision such that the receipt of additional evidence would serve no useful purpose." *Department of Defense v. AT & T*, 80 FCC 2d 287, 290 (1980). Indeed, it is well established that even in a case where constitutional due process arguments are raised by the defendant, which is not the case here, if there is no material dispute as to the decisionally-significant facts and only the legal conclusions derived therefrom are contraverted, we have ample discretion to resolve these matters upon the basis of the evidence of record without resorting to time-consuming and costly evidentiary proceedings before an administrative law judge. *Northwestern Indiana Telephone Co. v. FCC*, 824 F.2d 1205, 1211 (D.C. Cir. 1987).

10. Accordingly, IT IS ORDERED that our previous order in this matter IS VACATED.

11. IT IS FURTHER ORDERED that Amtel's Application for Review IS GRANTED consistent with the above and DENIED in all other respects.

12. IT IS FURTHER ORDERED that Amtel's complaint IS DENIED on the merits.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Amtel Corporation v. FCC, No. 89-9519 (10th Cir. June 2, 1989).

[2] Amtel v. Mountain States Telephone and Telegraph Company, 4 FCC Rcd 2148 (1989).

[3] Amtel v. Mountain States Telephone and Telegraph Company, 3 FCC Rcd 3719 (1988)(*Bureau Order*).

[4] MTS and WATS Market Structure, Third Report and Order, CC Docket No. 78-72, Phase I, 93 FCC 2d 241 (1983), *modified on reconsideration*, 97 FCC 2d 682 (1983) (*First Reconsideration*), *modified on further reconsideration*, 97 FCC 2d 834 (1984) (*Second Reconsideration*), *aff'd and remanded in part sub nom.* NARUC v. FCC, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985), *modified on further reconsideration*, 99 FCC 2d 708 (1984), 101 FCC 2d 1222 (1985) (*Third Reconsideration*), *aff'd on further reconsideration*, 102 FCC 2d 849 (1985) (*Fourth Reconsideration*), *pet. for review denied sub nom.* AT&T v. FCC, 832 F.2d 1285 (1987).

[5] We have not required exchange carriers to convert their end offices precipitantly. *Fourth Reconsideration Order*, 102 FCC 2d at 861. To do so could create a substantial burden on the companies and their ratepayers contrary to the public interest.

[6] We also note that long distance carriers whose minutes of use are below the assumed surrogate have an option of connecting in a nearby end office that has measurement capability and paying extra mileage charges for extension of service from that office.

[7] Because we here fully address Amtel's arguments on the merits, we need not, and do not, decide the question whether the Bureau Chief exceeded his delegated authority in this matter.

[8] Application for Review at p. 9.

[9] Amtel filed its complaint setting forth facts and legal arguments, to which Mountain States answered. Additional substantive pleadings included: Mountain States' Motion to Dismiss, Amtel's opposition thereto and Mountain States' Reply. Both parties filed separate legal briefs with Amtel also filing a reply brief. Counsel for both parties appeared before Bureau staff in a status conference pursuant to Section 1.732 of the Rules and subsequently participated with the staff in a telephone conference call.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WESTERN UNION CORPORATION,
Complainant,

v.

SOUTHERN NEW ENGLAND TELEPHONE COMPANY,	File No. E-89-75
SOUTHWESTERN BELL TELEPHONE COMPANY,	File No. E-89-76
NEVADA BELL,	File No. E-89-77
CINCINNATI BELL TELEPHONE COMPANY,	File No. E-89-78
NEW YORK TELEPHONE COMPANY,	File No. E-89-79
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,	File No. E-89-80
PACIFIC BELL,	File No. E-89-81
THE MOUNTAIN STATES TELEPHONE COMPANY, NORTHWESTERN BELL TELEPHONE COMPANY, PACIFIC NORTHWEST BELL TELEPHONE COMPANY,	File No. E-89-128
ILLINOIS BELL TELEPHONE COMPANY, INDIANA BELL TELEPHONE COMPANY, INC., MICHIGAN BELL TELEPHONE COMPANY, THE OHIO BELL TELEPHONE COMPANY, WISCONSIN BELL, INC.,	File No. E-89-129
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, SOUTH CENTRAL BELL TELEPHONE COMPANY,	File No. E-89-130
BELL ATLANTIC CORPORATION. Defendants.	File No. E-89-131

ORDER

Adopted: December 15, 1989; Released: December 21, 1989

By the Chief, Common Carrier Bureau:

1. The above-captioned complaints pending at the Commission are hereby deferred to such future date as will be determined by the Common Carrier Bureau (Bureau). We are cognizant that this order conflicts with an earlier Bureau determination that time constraints imposed by the Federal Communications Commission Authorization Act of 1988 (FCCAA), Pub. L. No. 100-594, 102 STAT. 3021 (Nov. 3, 1988), preclude any deferral of prosecution of these complaints. *See Western Union Corporation v. Southern New England Telephone Company, et al.*, 4 FCC Rcd 3427 (Enf. Div., 1989). We are reinterpreting the application of the FCCAA to this proceeding and, specifically, Section 208(b)(1) of the Act, as amended, 47 U.S.C. § 208(b)(1), based on our conclusion that the time constraints imposed thereby do not mechanically apply in the instant case. We note that all of the parties previously requested that these complaints be viewed as "contingent" complaints and, in effect, be held in abeyance pending resolution of the remand proceeding in *Western Union Corp. v. FCC*, 856 F.2d 315 (D.C. Cir. 1988), *remanding Investigation of Special Access Tariffs of Local Exchange Carriers*, CC Docket No. 85-166 - Phase I, FCC 86-52 (released Jan. 24, 1986), *recon. denied, Memorandum Opinion and Order On Reconsideration*, 1 FCC Rcd 427 (1986), which involves the same basic issues that underlie these complaints. We intend to resume action on the complaints immediately following resolution of the remand proceeding.

2. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the above-captioned complaints be held in abeyance pending further Commission action.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re application of

WHIDBEY BROADCASTING SERVICE, INC. KJTT(AM), Oak Harbor, Washington — FILE NO. BL-841227AD

For a license to cover construction permit

MEMORANDUM OPINION AND ORDER

Adopted: December 4, 1989; Released: December 22, 1989

By the Commission:

1. The Commission has before it for consideration an Application for Review filed May 12, 1988, by King Broadcasting Company ("King"), licensee of KING(AM), Seattle, Washington. King seeks Commission review of a Bureau decision issued April 12, 1988, denying its petition for reconsideration of a grant of a license application (File No. BL-841227AD) filed by Whidbey Broadcasting Service, Inc. ("Whidbey") for new station KJTT(AM), Oak Harbor, Washington, with which KING is a competitor. King's petition for reconsideration was denied on procedural grounds because King, having filed nothing in opposition to the license application, was not a party and did not show that its participation was not possible at an earlier stage of the proceeding. *See* letter from Larry Eads, Chief, Audio Services Division, dated April 12, 1988. The merits of the petition were not reached. King now seeks review of this decision, stating that it permits a normally prohibited contour overlap between KING and KJTT.

BACKGROUND

2. While Whidbey's construction permit application (File No. BP-830107AB) was pending, King timely filed a petition to deny on the ground that the proposed 25mV/m and 2mV/m contours would overlap with KING's 2mV/m and 25mV/m contours, respectively, in violation of 47 C.F.R. Section 73.37(a). Whidbey then filed an amendment which, based on the field intensity measurements King submitted with its petition to deny, cured the overlap problem by changing the transmitter site. At that time the Whidbey application was granted, and the King petition was dismissed as moot. *See* Letter from John Morgan, Chief, AM Branch, dated April 16, 1984. King then filed a petition for reconsideration of this action, which, as recounted in its application for review, conceded that Whidbey's amendment cured, to its satisfaction, the very overlap problem of which it now complains, *i.e.*, Whidbey's 25mV/m contour and KING's 2mV/m contour, but maintained that overlap persisted between the proposed 2mV/m contour and KING's 25mV/m contour. Whidbey then wrote a letter to King in which it stated, "Whidbey Broadcasting Services is willing to cooperate to help eliminate any reasonable claims of objectionable interference that might be caused to the signal of KING(AM) should any be found." King then withdrew its petition, allegedly in reliance on this letter. On December 27, 1984, Whidbey filed an application for the station license which accorded it automatic program test authority pursuant to Section 73.1620 of the Rules. The application was unopposed, processed routinely, and granted on February 1, 1985. (*Public Notice* No. 19423). After KJTT's facility was built and licensed, King conducted field intensity measurements and allegedly found contour overlap between the KJTT 25mV/m contour and the KING 2mV/m contour, the same overlap problem that King, in its petition for reconsideration of the grant of the construction permit, had stated was cured by KJTT's amendment to its construction permit. King's measurements at this time purported to show that the KING 2mV/m contour enveloped KJTT's transmitter site. On March 4, 1985, King filed a petition for reconsideration of the grant of the license application. This was denied on procedural grounds on April 12, 1988. On May 12, 1988, King filed the instant application for review. On June 13, 1988, Whidbey responded, and on June 28, 1988, King filed a reply to Whidbey's response.

3. King contends that the Bureau did not act properly in denying its petition for reconsideration on procedural grounds without addressing the merits because the public interest in interference-free service outweighs the procedural considerations. King argues that special circumstances exist in this case to excuse its tardiness in filing its petition. First, King asserts that the precise location of the actual service contours could be determined only through field intensity measurements because of the complex conductivity changes over relevant signal paths, and second, King cites its alleged reliance on Whidbey's letter stating its willingness to cooperate. Finally, King states that its failure to participate earlier should not outweigh the public interest in allowing late-comers to litigate an interference claim, and that the Commission has failed to meet its statutory obligation to protect licensed stations from interference by licensing a station when the existence of an actual overlap has been shown. In its reply, King states that the grant of KJTT's license violates its rights under Section 316 of the Communications Act of 1934, as amended, because its license has been modified without notice or opportunity to protest.

DISCUSSION

4. At the outset, we address the issue of the Bureau's meeting its statutory obligation to protect licensed stations from interference. The best data available to the Bureau at the time the license application was under consideration indicated that no prohibited contour overlap would result from the operation of the proposed facility.[1] Therefore, the Bureau was in full compliance with all of its statutory and regulatory obligations. There was no apparent violation of 47 C.F.R. Section 73.37(a) at the time of grant.

5. In denying the petition for reconsideration against the license application, the Bureau found that King failed to meet the threshold requirements of 47 C.F.R. Section 1.106(b)(1), which states that petitions for reconsideration may only be filed by (1) parties to the proceeding or, (2) if not a party, persons whose interests are adversely affected by any action taken by the Commission who show

good reason why it was not possible for them to participate in the earlier stages of the proceeding. The Bureau properly reasoned that King was not a party to the license application proceeding because King filed nothing in opposition to that application, and had withdrawn its petition for reconsideration of the grant of the underlying construction permit. The Bureau also properly reasoned that King did not give good reasons for its failure to participate earlier.

6. As justification for this failure, King argues, first, that it waited for the new station to be operational in order to take needed measurements, and second, that it relied on Whidbey's promise to cooperate in the July 18, 1984, letter. With respect to the field intensity data, sufficiently conclusive measurements of KING's signal alone, in support of King's claim that its 2mV/m contour enveloped KJTT's transmitter site, could have been made in a timely fashion since they were not dependent upon the operational status of KJTT. Instead of proceeding diligently to make an adequate showing relying upon the KING data alone, however, King delayed until KJTT was operational and then made measurements of KJTT's signal as well as its own. The measurements of KJTT's signal, however, merely confirmed the basic accuracy of the predicted KJTT contour locations that were known at the application processing stage, and therefore, were inconsequential, adding nothing to King's argument. Based upon these circumstances, the Bureau correctly concluded that King's failure to participate earlier was unjustified because the determinative measurements relied upon in the petition for reconsideration could have been taken at an earlier time and King had an obligation to act. As to King's assertion of reliance on Whidbey's letter, King has failed to establish that the Whidbey letter constitutes an agreement to cure the disputed overlap between the stations or that such reliance was justifiable since the purported overlap at issue - between the KING 2 mV/m and the KJTT 25 mV/m - appeared to have been resolved to the satisfaction of all parties at the time the letter was written. Indeed, King stated in its petition for reconsideration of the grant of the Whidbey construction permit that the amendment cured this particular overlap problem. In context, therefore, it appears that Whidbey's letter did not even contemplate a problem regarding, or, for that matter, even the existence of, the overlap of which King now complains.

7. Alternatively, King urges the Commission to find that the public interest requires consideration of the merits of its petition under Section 1.106(c)(2), since such a finding would relieve King of the burden of showing "good reason" under Section 1.106(b)(1) for its failure to participate in a timely fashion. King also states that the Commission has held that, in cases such as this, in which actual overlap is alleged to have been detected after a new station is licensed, the petitioner's failure to participate at earlier procedural stages is not always a bar to consideration of its claim, citing *Southwest Broadcasting Co.*, 16 RR2d 963 (1969) and *Effingham Broadcasting Co.*, 4 RR2d 494 (1965). However, King's reliance on these cases is misplaced. Unlike the present situation, in these cases the public interest required consideration of the petitioner's contentions because the information relied on could not have been obtained at an earlier stage through the use of ordinary diligence. *See Southwest* at 964; *Effingham* at 496-7. Here, King could have presented the information on which it now relies, the purported showing that its 2mV/m contour would envelop the KJTT transmitter site, at any time without regard to the operational status of KJTT, but failed to do so through a lack of ordinary diligence. The Commission has held that where a petitioner could have filed a petition to deny an application during its pendency, and failed to do so through a lack of ordinary diligence, even if in reliance on an agreement made by the licensee, petitioner failed to show good reason for its failure to participate earlier. *Wayne State University*, 33 RR2d 1371 (1975).

8. With respect to Section 316 of the Communications Act of 1934, as amended, King argues that its rights under that section have been violated because its license has been modified without notice and opportunity to protest. However, these provisions are properly raised at the time during which a construction permit is under consideration by the Commission, not when an application for a license to cover is being considered, as here. *See Effingham* at 496; *CBS, Inc., of California v. FCC*, 21 F.2d 644, 10 RR 2021, 2024, (D.C. Cir. 1954), *cert. denied*, 348 U.S. 87 (1954); *Benton Broadcasting Service*, 9 RR 586, 588 (1953). Furthermore, in the interest of administrative finality, once a construction permit has been issued and no valid protest has been filed, another licensee has no right to a second chance to object after the permittee has completed construction. *Benton* at 589. Although under Section 319(c) of the Act, the Commission may order a hearing at this stage in extraordinary circumstances, an important factor to consider in cases of this kind is whether the objecting party had knowledge of or could have discovered the relevant facts through the use of ordinary diligence but failed to come forth with such facts on a timely basis. *See KACY, Inc.*, 22 RR2d 428, 432 (1971). Furthermore, if an existing licensee can establish by actual measurements that it will receive objectionable interference from a proposed service, the existing licensee has a duty of diligence to come forward before the station is built. *Benton* at 590. If a licensee claiming interference to its signal fails to use ordinary diligence in raising this issue, that licensee will not be accorded an opportunity to protest in an untimely manner. *Id.* This is required by the public interest in order to balance the respective equities of the parties involved, so that the issue of overlap is addressed before the construction permit is issued and substantial investment is made in reliance on that grant. As stated above, King could have taken measurements of its own signal at any time to detect the purported overlap which it now alleges modifies its license.[2] King failed to use ordinary diligence in making the measurements that would have detected the purported overlap. Therefore, the facts and circumstances do not warrant invoking the Commission's discretionary authority under Section 319(c) to order a hearing at the licensing stage.

CONCLUSION

9. Based on the foregoing, the decision of the Mass Media Bureau denying King Broadcasting Company's petition for reconsideration of the grant of the license to cover the construction permit for KJTT(AM) is affirmed due to King's failure to use ordinary diligence in pursuing this matter.

10. Accordingly, IT IS ORDERED that the Application for Review filed by King Broadcasting Company, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The cases King cites in support of its proposition that the Commission abdicated an affirmative duty to protect the public interest are distinguishable from the instant case, and the quote from those cases is taken out of context. In *National Association of Independent Television Producers & Distributers v. FCC*, 502 F.2d 249 (2d Cir. 1974), the court addressed the rights of the public in a Rule Making proceeding before the Commission, which is different than a licensing proceeding, because the Commission requests comments from the public in a Rule Making proceeding. Furthermore, *Scenic Hudson Preservation Conference v. FPC*, 354 F2d 608 (2d Cir. 1965), involved the licensing of a hydroelectric facility, which inherently involves different public interest considerations than a broadcast facility.

[2] To date, King has not reported any interference complaints from listeners, but if any should occur, appropriate procedures will be used to deal with them.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-577

In the Matter of

Amendment of Section 73.202(b), RM-7093
Table of Allotments,
FM Broadcast Stations.
(Hutchinson, Kansas)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 5, 1989; Released: December 22, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by KWHK Broadcasting Company, Inc. (petitioner), requesting the substitution of FM Channel 246C3 for Channel 246A at Hutchinson, Kansas. Petitioner filed information in support of the proposed substitution at Hutchinson.

2. We believe petitioner's proposal warrants consideration. Channel 246C3 can be allotted to Hutchinson, Kansas, in compliance with the minimum distance separation requirements of the Commission's Rules at petitioner's specified site[1] We shall also propose to modify the construction permit of KWHK Broadcasting Company, Inc., to specify operation on Channel 246C3 in accordance with Section 1.420(g) of the Commission's Rules.[2]

3. In order to provide an additional wide coverage area station for Hutchinson, Kansas, the Commission PROPOSES To Amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Hutchinson, Kansas	246A, 271C 275C1	246C3, 271C, 275C1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **February 12, 1990,** and reply comments on or before **February 27, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Rodney Joyce
Dan J. Alpert
Ginsburg, Feldman & Bress, Chartered
1250 Connecticut Avenue, N.W.
Suite 800
Washington, D.C. 20036

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202(b), 73. 504 and 73. 606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment

is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The coordinates for Channel 246C3 are 38-02-39 and 98-00-56.

[2] The construction permit for Channel 246A was granted on September 29, 1989 (BPH-881116MF).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-574

In the Matter of

Amendment of Section 73.202(b), RM-7068
Table of Allotments,
FM Broadcast Stations.
(Wanchese, North Carolina)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 1, 1989; Released: December 22, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by WOBR, Inc. (petitioner), requesting the substitution of Channel 237C3 for Channel 237A at Wanchese, North Carolina, and the modification of its license for Station WOBR-FM to specify the higher powered channel. Petitioner states that it will apply for Channel 237C3, if allotted.

2. We believe the public interest would be served by seeking comments on the substitution of Channel 237C3 for Channel 237A at Wanchese since it could provide the community with its first wide coverage area FM service. As requested, we also propose to modify petitioner's license for Station WOBR-FM to specify operation on the higher powered channel. In accordance with Section 1.420 of the Commission's Rules, we will not accept competing expressions of interest in use of the channel at Wanchese or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties. Channel 237C3 can be allotted to Wanchese in compliance with the Commission's minimum distance separation requirements with a site restriction of 6.6 kilometers (4.1 miles) northeast to avoid a short-spacing to Station WRNS-FM, Channel 236C, Kinston, North Carolina, and to accommodate petitioner's desired transmitter site.[1]

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Wanchese, North Carolina	237A	237C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **February 12, 1990,** and reply comments on or before **February 27, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Mark J. Prak, Esq.
Tharrington, Smith & Hargrove
209 Fayetteville Street Mall
P.O. Box 1151
Raleigh, North Carolina 27602
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 35-53-20 and West Longitude 75-35-20.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-578

In the Matter of

Amendment of Section 73.202(b), RM-7167
Table of Allotments,
FM Broadcast Stations.
(Ocean City, Maryland)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 5, 1989; Released: December 22, 1989

By the Chief, Allocations Branch:

1. The Commission has before it a petition for rule making filed by Joseph A. Booth (petitioner), requesting the allotment of FM Channel 295A to Ocean City, Maryland, as that community's third FM broadcast service. Petitioner submitted information in support of the proposal and stated his intention to file an application for the channel.

2. We believe the proposal warrants consideration. Channel 295A can be allotted to Ocean City, Maryland, in compliance with the minimum distance separation requirements of the Commission's Rules at the city reference coordinates.[1]

3. In view of the fact that the proposed allotment could provide a third FM broadcast service to Ocean City, Maryland, the Commission believes it is appropriate to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Ocean City, Maryland	260B, 284B	260B, 284B, 295A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **February 12, 1990,** and reply comments on or before **February 27, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Stephen T. Yelverton
Maupin Taylor Ellis & Adams, P.C.
1130 Connecticut Avenue, N.W.
Suite 750
Washington, D.C. 20036
(counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202(b), 73. 504 and 73. 606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment

is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 295A are 32-20-00 and 75-05-18.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-576

In the Matter of

Amendment of Section 73.202(b),	RM-7058
Table of Allotments,	
FM Broadcast Stations.	
(Helena, Montana)	

NOTICE OF PROPOSED RULE MAKING

Adopted: December 5, 1989; Released: December 22, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Hi-Line Radio Fellowship, Inc. (petitioner), requesting the allotment of Channel *276C to Helena, Montana, and its reservation for noncommercial educational use. Petitioner submitted information in support of the proposal and states its intention to apply for the channel.

2. Generally, noncommercial educational stations operate within the reserved portion of the FM band (channels 201-220). However, exceptions have been made where channels in the noncommercial educational band are not available because of foreign allotments (Canadian or Mexican) or potential interference to operation on VHF Television Channel 6. Here, potential interference to Station KTVM, Channel 6, Helena, Montana, appears to justify the reservation of a channel in the nonreserved band (channels 221-300) for noncommercial educational use. The allotment and reservation of a commercial channel appears to be the only way to provide a Class C noncommercial educational channel to Helena.

3. We believe the public interest would be served by proposing to allot Channel *276C to Helena. Montana, and to reserve the channel for noncommercial educational use. The channel can be allotted to Helena in compliance with the Commission's minimum distance separation requirements without a site restriction.[1] Since Helena is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government will be requested for this allotment.

4. In view of the foregoing, we propose to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules with respect to the following community:

	Channel No.	
City	Present	Proposed
Helena, Montana	258C1, 266C, 287C	258C1, 266C *276C, 287C

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **February 12, 1990,** and reply comments on or before **February 27, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Marvin R. Calahan, President
Hi-Line Radio Fellowship, Inc.
P.O. Box 4111
Helena, Montana 59604

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202(b), 73. 504 and 73. 606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND

the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel *276C are 46-35-42 and 112-01-36.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

MOBILFONE OF NORTHEASTERN PENNSYLVANIA, INC.

For authority to construct and operate facilities on frequency 454.650 MHz for Station KGC404 in the Public Land Mobile Radio Service at Hazelton, Pennsylvania — File No. 24568-CD-P/L-1-85

For authority to construct and operate facilities on frequency 158.70 MHz for Station KGI781 in the Public Land Mobile Radio Service at Bald Mountain, Pennsylvania — File No. 24694-CD-P/ML-1-85

For authority to operate facilities on frequency 454.650 MHz for Station KDS 902 in the Public Land Mobile Radio Service at Montrose, Pennsylvania — File No. 24704-CD-MP/ML-1-85

MEMORANDUM OPINION AND ORDER

Adopted: December 14, 1989; Released: December 21, 1989

By the Chief, Mobile Services Division:

I. BACKGROUND AND CONTENTIONS

1. Mobilfone of Northeastern Pennsylvania, Inc. (Mobilfone) currently operates six two-way frequencies at Station KGC404, Scranton/Wilkes-Barre, Pennsylvania. Four of those frequencies are in the 450 MHz band and two are in the 150 MHz band. On August 26, 1985, Mobilfone filed an application (File No. 24568-CD-P/L-1-85) for authority to construct and operate a new two-way facility for Station KGC404 on frequency 454.650 MHz at Hazleton, Pennsylvania. On September 16, 1985, Mobilfone filed an application (File No. 24694-CD-P/ML-1-85) to modify its one-way facility Station KGI781 operating on frequency 158.70 MHz at Bald Mountain, Pennsylvania. In that application, Mobilfone proposes to construct a four hundred foot tower at Bald Mountain, but emphasizes that neither the authorized power or antenna height of its facility at Bald Mountain will change. Mobilfone further states that there will be no increase in the Bald Mountain station's service area or interference contours and there will be no increase in the potential for co-channel interference. On September 17, 1985, Mobilfone filed an application (File No. 24704-CD-MP/ML-1-85) to change the frequency of Station KDS902 from 454.225 MHz to 454.650 MHz at Montrose, Pennsylvania. Commonwealth Telephone Company (Commonwealth)[1] has filed petitions to deny the captioned applications of Mobilfone. Responsive pleadings have been filed.

2. Commonwealth argues that Mobilfone's Hazleton application does not comply with the traffic load study requirement in Sections 22.16 and 22.516 of the Commission's Rules.[2] Commonwealth contends that Mobilfone should have provided traffic load studies for the four 454 MHz frequencies at Mobilfone's KGC404 Station in Scranton and Wilkes-Barre, because of their close proximity to the proposed Hazelton facility, instead of merely providing a traffic load study for the 152.03 MHz station in Scranton/Wilkes-Barre. Moreover, Commonwealth alleges, Mobilfone is applying for frequencies in northeastern Pennsylvania that it does not need, and that it intends to warehouse, thus blocking competitors from applying for these frequencies. In addition, Commonwealth argues that for each of the captioned applications, Mobilfone has failed to list all its pending applications and existing stations within a forty mile radius of the proposed facilities, as required by Section 22.15(i)(2) of the Commission's Rules. For the foregoing reasons, Commonwealth alleges that Mobilfone's applications should be dismissed.

3. Mobilfone's opposition notes that its Hazleton application states that there are no other two-way facilities except the 152.03 MHz channel of Station KGC404 which overlap the proposed Hazleton service contour by more than 50 percent. Therefore, Mobilfone contends, additional traffic load studies for the Scranton/Wilkes-Barre stations were not required by the Commission's Rules. Moreover, Mobilfone points out, the applications at Bald Mountain and Montrose involve modifications of existing stations, and are not requests for additional facilities, and thus could not have been filed merely to block competitors from expanding into Mobilfone's area. Finally, Mobilfone states that on November 7, 1985, it filed an amendment to the captioned application at Hazleton, and on November 29, 1985, it filed amendments for the captioned applications at Bald Mountain and Montrose, which listed all the existing and proposed radio facilities within 40 miles of the antenna site proposed by Mobilfone for each location. Mobilfone states that the failure to mention the existence of such facilities in the original applications was completely inadvertent.

4. In reply, Commonwealth alleges that Mobilfone has provided no engineering support for its statement that no channel other than its 152.03 MHz channel overlap its proposed Hazleton service area by more than 50 percent. Commonwealth reiterates its contention that Mobilfone is applying for facilities that it does not need, solely to prevent other applicants from being awarded the frequencies. Commonwealth alleges that Mobilfone's repeated failure to list pending applications and existing facilities

within a forty mile radius indicates a deliberate intent to deceive or at least a "lack of candor" on the part of Mobilfone.

II. DISCUSSION

5. Applicants that request one or more frequencies for a new two-way facility, need to include traffic load studies only for those facilities which overlap their proposed service contour by more than 50%. 47 C.F.R. Sections 22.16(b)(2), 22.516(a)(2); *See Mobilfone of Northeastern Pennsylvania, Inc.*, 2 FCC Rcd 7165 (Mob. Ser. Div. 1987) (*Mobilfone*). The Mobile Services Division staff (MSD) has made a search of the mobile services data base and has determined that the only channel that has a 50% or more overlap with the proposed facility at Hazleton, is Station KGC404 operating on frequency 152.03 MHz at Scranton/Wilkes-Barre. Therefore, a traffic load study was required only for that station. In addition, the MSD has examined the traffic load study submitted with the Hazleton application and has determined that Mobilfone has justified the need for the additional frequency. Therefore, Commonwealth's allegation that Mobilfone did not provide sufficient traffic load studies with the Hazelton application is rejected.

6. Similarly, we reject Commonwealth's allegation that Mobilfone is warehousing frequencies for the sole purpose of blocking its competitors. Identical allegations were made by Commonwealth and rejected in *Mobilfone*. In *Mobilfone* the MSD stated that "the allegations [concerning warehousing] are without merit since they assume that Mobilfone has applied for frequencies which it is not entitled to use." 2 FCC Rcd at 7166. As in *Mobilfone*, we have examined the Hazleton application and determined that Mobilfone has demonstrated a need for and is entitled to use the frequency applied for in the Hazleton application. Therefore, Commonwealth's allegation concerning warehousing in the Hazleton application is similarly rejected. Moreover, we note that the Bald Mountain and Montrose applications are merely for modifications of existing stations. With reference to Bald Mountain, the application is for construction of a new tower with no increase in the station's service area or service contour. With reference to the Montrose application, the applicant is requesting a change from the 454.225 MHz frequency to the 454.650 MHz frequency and no mutually exclusive applications have been filed against the application. Therefore, Commonwealth has not adequately supported its allegations that Mobilfone is warehousing frequencies.

7. Finally, Commonwealth's argument that Mobilfone's failure to list all its pending applications and existing stations within a forty mile radius of its proposed facilities, represents a fatal defect which should have resulted in dismissal of its applications, has also been addressed and rejected in *Mobilfone*. Mobilfone cured this deficiency by filing amendments on November 7, 1985, and November 29, 1985, which provided the missing information. As we stated in *Mobilfone*,

> [a]lthough Mobilfone failed to list two applications in its initial application, these omissions were corrected in a timely manner and, in any event the omissions had no decisional significance because they constituted a minor defect in Mobilfone's initial applications. In this regard, the chief purpose behind the disclosure requirements of Section 22.15(i)(2) of the Rules is to provide information relevant to the loading of certain channels owned or to be owned by an applicant in the vicinity of its requested facilities, in order to assure that the applicant complies with the loading standards of Section 22.16 of the Rules. The omitted applications were for facilities that would be too distant from the facilities requested in the instant application to have any bearing on whether or not Mobilfone meets the requirements of Section 22.16 of the Rules. *Mobilfone*, 2 FCC Rcd at 7166.

For the same reasons enunciated in *Mobilfone*, we find that Mobilfone's omissions amounted to an inadvertent error and were not a deliberate attempt to deceive the Commission. Therefore, Commonwealth's arguments on this point are rejected.

8. We have examined Mobilfone's captioned applications and have determined that grant of these applications will be consistent with the public interest, convenience, and necessity.

III. ORDERING PARAGRAPHS

9. Accordingly, IT IS ORDERED, pursuant to Section 0.291 of the Commission's Rules, that the applications filed by Mobilfone of Northeastern Pennsylvania, Inc. (File Nos. 24568-CD-P/L-1-85, 24694-CD-P/ML-1-85 and 24704-CD-MP/ML-1-85) ARE GRANTED.

10. IT IS FURTHER ORDERED That the Petition to Dismiss or Deny filed by Commonwealth Telephone Company, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] Commonwealth operates mobile services facilities in northeast Pennsylvania and is a competitor of Mobilfone in the area.

[2] Sections 22.16 and 22.516 of the Commission's Rules provide in pertinent part that traffic load studies are required for applications which request one or more additional frequencies for an existing two-way station.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
December 12, 1989

Released: December 19, 1989

CERTIFIED MAIL **4620-PP**
RETURN RECEIPT REQUESTED

Paragon Communications
4582 S. Ulster Street
Suite 405
Denver, Colorado 80237

In re: Paragon Communications
Graham, Texas
TX0243

Gentlemen:

This is a Notice of Apparent Liability for forfeiture issued pursuant to §503(b) of the Communications Act of 1934, as amended. Paragon Communications (hereinafter Paragon) has incurred liability in the amount of four thousand dollars ($4,000), based on the following apparent willful and/or repeated violations of the Commission's Rules:

> Emission of radiation in excess of twenty (20) microvolts per meter measured at a distance of ten feet from the cable on September 27 and 28, 1989, in violation of §76.605(a)(11) of the Commission's Rules. ($4,000)[1]

On September 27 and 28, 1989, staff from the Commission's Field Operations Bureau (FOB) at Dallas, Texas discovered the above apparent signal leakage violations during inspections of the Graham, Texas cable system (see Appendix I attached). These inspections were the result of reports made by the Federal Aviation Administration (FAA) of interference to two aeronautical frequencies, 133.25 MHz and 133.35 MHz, in the vicinity of Graham, Texas. Paragon was operating on frequencies which may have caused the interference. Consequently, Paragon was ordered to cease operations in the aviation frequency bands on September 28, 1989, pursuant to §76.613(c) of the Commission's Rules. Subsequently, the FAA reported on September 29, 1989 that the interference had stopped.

It is apparent from the severity of the leaks found that Paragon has a serious leakage problem. Under the Commission's regulatory framework, a cable system's use of spectrum is dependent upon its ability to strictly limit signal leakage. Cable systems employ closed cable delivery systems which are not intended to radiate frequencies over-the-air. Thus, cable television systems and authorized over-the-air users may use the same frequencies in the same vicinity. Cable systems must meet stringent Commission radiation standards to ensure that their use of the same frequencies via coaxial cable will not interfere with over-the-air licensed services operating on the same frequencies. Section 76.605(a)(11) of the Commission's Rules prohibits cable systems, such as Paragon, which operate in the 54-216 MHz band, from radiating in excess of 20 microvolts per meter measured at a distance of ten (10) feet from the cable. The Commission has repeatedly expressed its concern over the danger that exists to life and property from cable systems, such as Paragon, which radiate excessively. *Second Report and Order in Docket 21006*, 99 FCC 2d 512 (1984), *recon. denied*, 100 FCC 2d 117 (1985); *Further Notice of Proposed Rule Making*, 76 FCC 2d 311 (1980); and *Report and Order in Docket 21006*, 65 FCC 2d 813 (1977). Based upon the above facts, it appears that the Paragon system has been radiating in excess of the Commission's signal leakage standard, and that Paragon did create a threat to aeronautical communications because of signal leakage from its cable television system. This matter threatens the Commission's regulatory goal of compatibility between the use of frequencies by cable television systems and various co-located services and also constitutes a threat to life and property. Consequently, after considering all of the facts and circumstances in this matter, Paragon Communications' apparent violations warrant the imposition of a forfeiture of four thousand dollars ($4,000).

In regard to the forfeiture, Paragon may take any of the actions set forth in §1.80 of the Commission's Rules, as summarized in the attachment to this letter.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

CABLE TELEVISION ACTION

Report No.

The Commission, by its Mass Media Bureau, took the following action on the date shown:

	ACTION OF:
Paragon Cmmunications Graham, Texas TX0243	Issued, Notice of Apparent Liability for forfeiture in the amount of Four thousand dollars ($4,000) for violation of §76.605(a)(11) and §76.614 of the Rules, pursuant to §0.283 of the Commission's Rules.

FOOTNOTE

[1] The forfeiture amount of $4,000 is the maximum allowed under §503(b)(2) of the Communications Act, which limits a forfeiture to $2,000 per violation per day. Each day of a continuing violation constitutes a separate offense. The potential threat caused by such violations, however, render these monetary limitations only minimally adequate to ensure the public's safety. In recognition of this, the Commission has proposed changes in the sanction provisions of the Communications Act

so that larger forfeitures may be imposed. H.R. 3299 (the Omnibus Budget Reconciliation Act of 1989) would increase the permissible forfeiture level from $2,000 for each violation to $25,000.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

RAM COMMUNICATIONS OF MASSACHUSETTS, INC.

File No. 26197-CD-P/ML-01-87

For a construction permit and license for additional facilities for Station KSV956 to operate on 152.24 MHz in the Public Land Mobile Service at Lowell, Massachusetts

MEMORANDUM OPINION AND ORDER

Adopted: December 6, 1989; Released: December 21, 1989

By the Chief, Mobile Services Division:

1. ComEx, Inc. (ComEx) has filed a petition to dismiss or deny the above-captioned application of RAM Communications of Massachusetts, Inc. (RAM) for authorization of a new one-way station, on the frequency 152.24 MHz, at Lowell, Massachusetts.[1] RAM filed an opposition to the petition to which ComEx has replied.

I. BACKGROUND

2. On May 17, 1985 ComEx filed an application for an additional transmitting facility for station KCI295 at Nashua, New Hampshire on frequency 152.24 MHz.[2] In that application, ComEx conceded that its proposed facility would receive "a small amount of interference" from an existing station at Framingham, Massachusetts owned and operated by RAM. ComEx agreed to accept interference from this station. [3] ComEx's application was mutually exclusive with another application filed by RAM for one-way Station KSV956 on frequency 152.24 MHz at Andover, Massachusetts. On November 26, 1985, the Mobile Services Division held a lottery in the Public Mobile Service in which RAM was ranked first and ComEx was ranked second. Subsequently, in *ComEx, Inc.*, 3 FCC Rcd 2881 (Com. Car. Bur. 1988), the Common Carrier Bureau denied a petition for comparative hearing filed by ComEx and granted RAM's Andover application. ComEx has filed an Application for Review of this decision, which is pending.

II. CONTENTIONS OF THE PARTIES

3. In its petition filed in the captioned case, ComEx argues that RAM's application for a proposed station at Lowell, Massachusetts is electrically mutually exclusive with ComEx's proposal for Nashua, New Hampshire, which is the subject of the aforementioned application for review. Because RAM's application was filed long after the 60 day cut-off period provided for in the rules, ComEx contends that RAM's application is untimely and should be dismissed. According to ComEx, RAM's application is only eligible for refiling after final action is taken by the Commission on ComEx's pending application for review concerning its Nashua application.

4. In opposition, RAM argues that because RAM's proposed Lowell interference contour falls completely within the Framingham contour for which ComEx has agreed to accept interference, ComEx must also accept the interference it would receive from RAM's Lowell station. In support, RAM cites *RAM Communications of Michigan, Inc.*, 1 FCC Rcd at 145, which held that once a party agrees to accept interference, "it is not protected from subsequent interference-causing proposals, as long as the subsequent interference contours are within the original interference that was agreed to be accepted."

5. ComEx replies that while it has agreed to accept interference from RAM's existing facility at Framingham, Massachusetts, this concession was made only as a condition of obtaining a grant of ComEx's application for Nashua, and that this application has never been granted. Moreover, ComEx claims, RAM's proposed station at Lowell will add a second source of interference that may result in a greater level of interference than that caused by any one transmitter alone. According to ComEx, the *RAM Communications* and *Beep Communications*, Mimeo No. 2713 (Mob. Serv. Div. March 11, 1981), cases involved the relocation of facilities and did not deal with the effects of cumulative interference.[4] ComEx asserts that it did not agree to accept interference from additional transmitting facilities.

III. DISCUSSION

6. The issue here is whether ComEx's agreement to accept interference from RAM's Framingham facility precludes ComEx from now objecting to subsequent interference-causing proposals within the original interference contour of the Framingham facility.

7. Intially, we reject ComEx's argument that it accepted interference from RAM's Framingham station only as a condition of obtaining a grant of its Nashua application, and that until it receives such grant, it need not accept any interference. Once an operator agrees to accept interference from an existing station, it is not protected from subsequent interference-causing proposals as long as the subsequent interference contours are within the original interference contour that it agreed to accept. *See Ram Communications*, 1 FCC Rcd at 145.[5] The reason for this policy is that an applicant who accepts interference from an existing station, in effect, establishes for his proposed station, a reliable service area contour which excludes the area receiving interference, and relinquishes its rights to interference protection within the area outside this contour. Without such acceptance, the application would be dismissed for failure to demonstrate interference-free operation. Accordingly, ComEx may not condition its acceptance of interference on the grant of its application and may not pick and choose what interference it will accept.

8. Furthermore, ComEx's claim that RAM's proposed Lowell facility may result in interference which exceeds that of the existing interference it agreed to accept, is unsupported by the record evidence. In its application RAM has submitted interference studies demonstrating that its proposed facility will not increase interference beyond that which ComEx has already agreed to accept.[6]

Accordingly, contrary to ComEx's contention, Ram's application for Lowell, Massachusetts is not electrically mutually exclusive with ComEx's application for Nashua. In the absence of evidence to the contrary, therefore, we find that RAM's application is in compliance with Commission rules and may be granted.

9. Accordingly, IT IS ORDERED that the Petition to Deny filed by ComEx, Inc. against RAM Communications of Massachusetts, Inc. IS DENIED.

10. IT IS FURTHER ORDERED that the application of RAM Communications of Massachusetts, Inc. (File NO. 26197-CD-P/ML-01-87) IS GRANTED conditioned upon RAM's amending its application within thirty days of the release date of this order, to include a statement that it will accept interference from ComEX's proposed facility at Nashua, New Hampshire.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] RAM's application was filed September 17, 1987 and placed on Public Notice September 30, 1987.

[2] ComEx's application was placed on Public Notice July 24, 1985.

[3] Section 22.100 of the Commission's rules requires applicants to demonstrate interference-free operation. However, an applicant may agree to accept interference to its proposed facility. *See Ram Communications of Michigan, Inc.*, 1 FCC Rcd 145 (Com. Car. Bur. 1986).

[4] In support of its argument, ComEx cites *Interelectronics Corporation*, 2 FCC Rcd 6819 (Mob. Serv. Div. 1987), which it argues stands for the proposition that mutual exclusivity may exist between two pending applications even when one applicant has agreed to accept interference from an existing station.

[5] To the extent that *Interelectronics Corporation* is inconsistent with *Ram Communications* on this point, *Interelectronics Corporation* is hereby overruled.

[6] However, a review of RAM's interference study reveals that it would receive interference from ComEx's proposed facility. Pursuant to Section 22.100 of the rules, any application proposing a facility that would receive interference from another facility, may not be granted, unless the applicant agrees to accept that interference as a condition of its grant. Therefore, our grant to RAM herein, is conditioned upon RAM's amending its application within 30 days of the release date of this order, to include a statement that it will accept interference from ComEx's proposed facility in the event that ComEx ultimately receives a grant of its Nashua proposed facility.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-584

In the Matter of

Amendment of Section 73.202(b), RM-7023
Table of Allotments,
FM Broadcast Stations.
(Kekaha, Hawaii)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 1, 1989; Released: December 22, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Algoma Broadcasting Co. (petitioner), permittee for Channel 277A at Kekaha, Hawaii, requesting the substitution of Channel 277C1 for Channel 277A at Kekaha and the modification of its construction permit (BPH-881102MC) to specify operation on the higher class channel.

2. We believe the public interest would be served by proposing the substitution of Channel 277C1 for Channel 277A at Kekaha, Hawaii. Channel 277C1 can be allotted to Kekaha in compliance with the Commission's minimum distance separation requirements at the construction permit site.[1]

3. As requested, we shall also propose to modify petitioner's construction permit to specify operation on Channel 277C1. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest in use of the channel at Kekaha or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such interested parties.

4. In view of the fact that Kekaha, Hawaii, could receive a wide coverage area station the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Kekaha, Hawaii	277A	277C1

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **February 12, 1990,** and reply comments on or before **February 27, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Timothy D. Martz, President
Algoma Broadcasting Co.
P. O. Box 36
Fairfield, CT 06430
(Petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202(b), 73. 504 and 73. 606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates are North Latitude 21-58-16 and West Longitude 159-42-46.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-585

In the Matter of

Amendment of Section 73.202(b), RM-7035
Table of Allotments,
FM Broadcast Stations.
(Eatonton, Georgia)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 1, 1989; Released: December 22, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Steven D. King (petitioner), seeking the allotment of Channel 262A to Eatonton, Georgia, as the community's first local FM service. Channel 262A can be allotted to Eatonton in compliance with the Commission's minimum distance separation requirements with a site restriction of 9.2 kilometers (5 miles) south[1] in order to avoid a short-spacing to a construction permit for Station WSGY(FM), Channel 262C at Tifton, Georgia.

2. We believe the public interest would be served by proposing the allotment of Channel 262A to Eatonton, Georgia, since it could provide the community with its first local FM service. The Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Eatonton, Georgia	--	262A

3. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

4. Interested parties may file comments on or before **February 12, 1990,** and reply comments on or before **February 27, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Steven D. King
P. O. Box 90357
Atlanta, GA 30364

5. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202(b), 73. 504 and 73. 606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

6. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required*. Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures*. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 33-24-16 and West Longitude 83-21-07.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-586

In the Matter of

Amendment of Section 73.202(b), RM-7034
Table of Allotments,
FM Broadcast Stations.
(Millen, Georgia)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 1, 1989; Released: December 22, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Radio Millen Broadcasting Co., Inc., (petitioner), permittee of Channel 235A at Millen, Georgia, requests the substitution of Channel 235C3 for Channel 235A at Millen and the modification of its construction permit (BPH-880161MD) to specify operation on the higher class channel.

2. We believe the public interest would be served by proposing the substitution of Channel 235C3 for Channel 235A at Millen, Georgia. Channel 235C3 can be allotted to Millen in compliance with the Commission's minimum distance separation requirements at the site authorized in the construction permit.[1]

3. As requested, we shall also propose to modify petitioner's construction permit to specify operation on Channel 235C3. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest in use of the channel at Millen or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such interested persons.

4. In view of the fact that Millen could receive a wide coverage area station the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Millen, Georgia	235A	235C3

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **February 12, 1990,** and reply comments on or before **February 27, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

John P. Bankson, Jr.
Hopkins, Sutter, Hamel & Park
888 16th Street, N.W.
Washington, D. C. 20006
(Attorney for Radio Millen
Broadcasting Co., Inc.)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202(b), 73. 504 and 73. 606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates are North Latitutde 32-43-52 and West Longitude 81-51-40.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-215

In the Matter of

Amendment of Section 73.202(b),	*RM-5742*
Table of Allotments,	RM-5791
FM Broadcast Stations.	RM-6017
(*Campbellsville, Smiths Grove,*	RM-6176
Cave City, Horse Cave, and	RM-6294
Liberty, *Kentucky*, Donelson	*RM-6557*
and Mt. Juliet, Tennessee)	RM-6558

SECOND REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 1, 1989; Released: December 22, 1989

By the Chief, Allocations Branch:

1. In a previously adopted *First Report and Order* in this proceeding, 4 FCC Rcd 5770 (1989), we allotted Channel 260A to Campbellsville, Kentucky, as that community's second local service, Channel 264A to Horse Cave, Kentucky, as a first local service, substituted Channel 254A for Channel 288A at Liberty, Kentucky, and allotted Channel 294A to Mt. Juliet, Tennessee, as a first local service. In addition, we deferred for later consideration a counterproposal filed by Hilltopper Broadcasting, Inc. ("Hilltopper"), seeking the upgrade of Station WBLG(FM) at Smiths Grove, Kentucky. Hilltopper's counterproposal requests the substitution of Channel 296C2 for Channel 296A at Smiths Grove, Kentucky, and modification of its license for Station WBLG(FM) to specify operation on the higher powered channel.

2. Hilltopper's proposal to substitute Channel 296C2 for Channel 296A at Smiths Grove, Kentucky, requires the substitution of Channel 279A for Channel 294A at Cave City, Kentucky, and Channel 281A for Channel 280A at Campbellsville, Kentucky. Contemporaneously with the *First Report and Order*, we issued *Show Cause Orders* to Steven M. Newberry ("Newberry"), permittee for Station WHHT(FM), Channel 294A, Cave City, and Heartland Communications, Inc. ("Heartland"), licensee of Station WCKQ(FM), Channel 280A, Campbellsville. to demonstrate why their authorizations should not be modified to specify operation on Channels 279A and 281A in lieu of Channel 294A and 280A. In response to the *Show Cause Orders*, Heartland filed comments supporting the proposed change. Newberry filed no response to the *Show Cause Order* as to why its construction permit should not be modified. Accordingly, pursuant to Section 1.87 of the Commission's Rules, both parties are deemed to have consented to the proposed modification.

3. Hilltopper filed comments restating its willingness to reimburse both Stations WHHT(FM), Channel 294A, Cave City, and Station WCKQ(FM), Channel 280A, Campbellsville, for the reasonable expenses incurred in modifying their facilities to operate on the new channels.

4. Based on the above information, we believe the public interest would be served by substituting Channel 296C2 for Channel 296A at Smiths Grove, Kentucky.[1] Channel 279A can be substituted for Channel 294A at Cave City at the construction permit site in compliance with the Commission's minimum distance separation requirements.[2] Channel 281A can be substituted for Channel 280A at Campbellsville, at the present site of Station WCKQ, in compliance with the Commission's minimum distance separation requirement.[3] In accordance with Section 1.420(g) of the Commission's Rules, we shall modify the license of Station WBLG(FM) to specify operation on Channel 296C2. In addition, as stated in the *First Report and Order*, First Media's application for an upgraded assignment represents a mere site preference, and, therefore, does not present sufficient public interest benefit to warrant preferring it over the benefits that could be realized from Hilltopper's proposal. Therefore, in view of our action allotting Channel 296C2 to Smiths Grove, First Media will be permitted to amend its application (BMPH-880309IB) to specify facilities complying with the Commission's Rules.

5. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 5, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Campbellsville, Kentucky	281A
Cave City, Kentucky	279A
Smiths Grove, Kentucky	296C2

6. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Hilltopper Broadcasting, Inc., for Station WBLG(FM), Smiths Grove, Kentucky, IS MODIFIED, to specify operation on Channel 296C2 in lieu of Channel 296A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

7. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Heartland Communications, Inc.,

for Station WCKQ(FM), Campbellsville, Kentucky, IS MODIFIED, to specify operation on Channel 281A in lieu of Channel 280A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station WCKQ(FM)'s license BLH-790117AE, except the channel as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules, requires prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BLH-790117AE, except for the channel as specified above, and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

8. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit of Steven M. Newberry, for Station WHHT(FM), Cave City, Kentucky, IS MODIFIED, to specify operation on Channel 279A in lieu of Channel 294A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station WHHT's construction permit BPH-861126MQ except the channel as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules, requires prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with construction permit BPH-861126MQ, except for the channel as specified above, and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

9. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the following:

John Wells King, Esq.
Haley, Bader & Potts
2000 M Street, N.W., Suite 600
Washington, D.C. 20036
(Counsel for Heartland Communications, Inc.)

Steven M. Newberry
Route One
Cave City, Kentucky 42127
(Permittee for Station WHHT)

Blair, Joyce & Silva
1825 K Street, N.W., Suite 510
Washington, D.C. 20006
(Counsel for Steven Newberry)

Christopher J. Reynolds, Esq.
Dempsey & Koplovitch
1401 New York Avenue, N.W.
Washington, D.C. 20005
(Counsel to First Media of Monterey, Inc.)

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

11. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The coordinates for Channel 296C2 at Smiths Grove, Kentucky, are 36-50-10 and 86-16-40.

[2] The coordinates for Channel 279A, Cave City, Kentucky, are 37-06-39 and 85-58-41.

[3] The coordinates for Channel 281A, Campbellsville, Kentucky, are 37-20-05 and 85-22-36.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-587

In the Matter of

Amendment of Section 73.202(b), RM-6602
Table of Allotments,
FM Broadcast Stations.
(Bisbee and Green Valley,
Arizona)

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: December 1, 1989; Released: December 22, 1989

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the petition for rule making filed on behalf of Southwestern Wireless, Inc. (petitioner), licensee of Station KQYT(FM),[1] Channel 221A, Green Valley, Arizona, requesting the substitution of Channel 221C2 for Channel 221A at Green Valley and modification of its license to specify the higher-powered channel. In order to accommodate this substitution in compliance with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, petitioner also requests changes at Tucson, and Bisbee, Arizona. Specifically, petitioner seeks the substitution of Channel 217C2 for Channel 219A at Tucson, Arizona, and the modification of the Foundation for Creative Broadcasting's ("FCB") license for noncommercial educational Station KXCI(FM), Channel 219A, accordingly. Additionally, petitioner requests the substitution of Channel 222A for Channel 221A at Bisbee, Arizona, and modification of the license of Cooper Valley Broadcasters, Inc. ("Cooper"), for Station KZMK(FM) accordingly.

2. In support of its proposal petitioner states that "Green Valley is essentially a residential suburb of Tucson, Arizona, and is within the Tucson, Arizona, metropolitan statistical area. Accordingly, a significant portion of the population works in Tucson, and Tucson is the major financial, political, cultural, educational and commercial center for Green Valley." However, petitioner adds that its present Class A operation will not permit it to effectively serve much of the Tucson area, and, as a consequence, its economic handicap restricts its ability to serve effectively the local needs of Green Valley residents. Petitioner asserts that if allowed to upgrade to a Class C2 channel, Station KQYT(FM) will be able "to compete effectively in the metropolitan area in which it is located, and as a result, to better serve its community of license." Petitioner adds that the requested increase in its facilities would allow it to increase its service area from a present 107,919 persons to 515,572, a gain of 407,653 persons in an area of 6,306 square miles.

3. A staff engineering analysis of this proposal reveals that the 1 mv/m contour of a requested Channel 221C2 station at Green Valley, and the requested substitution of Channel 217C2 at Tucson, would both lie within the Grade B (47 dBu) contour of Station KUAT-TV, Channel 6, Tucson. In apparent recognition of the Commission's concern regarding the effect potential upgrades on Channel 221 have on the availability of noncommercial educational channels operating on Channels 218, 219 and 220 in markets where there exists a TV Channel 6 operation, petitioner advises that FCB has consented to the substitution of Channel 217C2 for Channel 219A, and the colocation of the facilities for Station KXCI(FM) with the transmitter site for Channel 6 Station KUAT-TV. Petitioner states that FCB has obtained permission for collocation from KUAT-TV. In support of its proposal, petitioner claims that the upgrade in class for the Green Valley station and collocation of KXCI(FM) with KUAT-TV would increase the population within KXCI's service area from 472,567 to 507,621, a gain of 35,054 people in an area of 3,041 square miles. Petitioner indicates that, using the KUAT-TV site, FCB could file an application for a Class C2 station that fully complies with the Commission's rules.

4. The Commission has expressed its concern that higher powered operation on Channel 221 not adversely affect the continued availability of noncommercial educational service in TV Channel 6 markets. In such markets, the existence of a TV Channel 6 station effectively restricts the use of the lower portion of the noncommercial educational band, while upgrades on Channel 221 could restrict the use of the higher portion of the spectrum. In accordance with the *First Report and Order* in MM Docket No. 86-144, 52 Fed. Reg. 8259, March 17, 1987, petitioner should provide a preclusion study demonstrating the impact of allotting Channel 221C2 to Green Valley on the availability of Class A, C3, C2, C1 and C noncommercial educational allotments on Channels 218, 219 and 220.[2] Guidelines for the preclusion study are as follows:

(a) The preclusion study should be done on each affected channel for each possible class of noncommercial FM station (that is A, B1 and B in zone I and 1A or A, C3, C2, C1 and C in zone II).

(b) For each class of noncommercial educational FM station, maximum power and antenna height and omnidirectional operation should be assumed.

(c) Preclusion should be considered to occur only if the noncommercial educational FM station would be prevented by the upgrade, and is not already precluded either by the existing Channel 221 station that is the subject of the proposal or by other commercial or noncommercial educational FM stations.[3]

(d) Preclusion should be determined both inside of and outside of the channel 6 Grade B contour. While the existence of the channel 6 station imposes a burden on noncommercial educational FM applicants, determination of the preclusive effect of the channel 6 station can be complicated and may be dependent on the particular transmitter site selected. Therefore, the initial preclusion area determination should be done without considering the

channel 6 station's impact. The channel 6 impact can be included at a later stage of the study, if necessary.

(e) Within any identified preclusion area, significant communities, normally those with a population in excess of 1000, should be identified. Existing local noncommercial educational FM stations in the precluded communities should be listed.

(f) Optionally, if precluded communities without local noncommercial educational FM service are found, additional information can be provided, including:

(i) Availability of noncommercial educational FM service from stations licensed to nearby communities;

(ii) Availability of other channels for a noncommercial educational FM station in the precluded community (include consideration of channel 6 station impact); and

(iii) Impact of channel 6 on noncommercial educational FM channel availability in the community. If a precluded community is a reasonable distance beyond the Grade B contour of the channel 6 station, then it is possible that the channel 6 station has no effect on the availability of a particular class of noncommercial educational FM station in that community. The non-commercial educational FM channel that is closest to channel 6 in frequency, and therefore most likely to be affected is channel 201. Preclusion in a community that is beyond the channel 6 impact distance is not significant. The appropriate distance for class C stations is found in Table A of Section 73.525(a)(1) of the Commission's Rules. Lesser distances are appropriate for other classes of noncommercial educational FM stations. For convenience, the distances have been calculated and are as follows:

Class	Distance from Channel 6 station
A	165 kilometers
B1	189 kilometers
B	207 kilometers
C3	189 kilometers
C2	207 kilometers
C1	234 kilometers
C	265 kilometers

Precluded communities within these distances from the channel 6 station generally constitute a negative factor to be weighed against the public interest gains sought through the upgrade.

5. We believe the public interest would be served by the petitioner's proposal since it could enable Station KQYT(FM), Green Valley and Station KXCI(FM), Tucson, Arizona, to increase their service areas. Therefore, we will seek comments on the proposal.

6. A staff engineering analysis reveals that Channel 221C2 can be substituted for Channel 221A at Green Valley at the petitioner's specified site 11.0 kilometers (6.8 miles) east of the community,[4] provided that Channel 222A is substituted for Channel 221A at the licensed site of Station KZMK(FM), Bisbee, Arizona.[5] Additionally, Channel 217C2 can be used at the present transmitter site of Station KUAT-TV.[6] However, petitioner's request to modify Station KXCI(FM) from Channel 219A to Channel 217C2 to accommodate its proposal is inappropriate for consideration here. Rather, as a result of the Commission's revision of Section 73.504 of the Rules, *supra*, proposals affecting FM changes in the noncommercial educational band are handled through the application process rather than in the rule making context. *See Apple Valley, et al., California*, 3 FCC Rcd 79 (1988). Therefore, the Green Valley proposal is contingent upon FCB filing an application and receiving authority to operate Station KXCI(FM) on Channel 217 at Tucson. Since Green Valley and Bisbee are each located within 320 kilometers (199 miles) of the U.S.-Mexico border, the Commission must obtain the Mexican Government's consent to the proposal.

7. In view of the above, we shall conditionally propose the substitution of Channel 221C2 for Channel 221A at Green Valley, Arizona, as requested. Additionally, we shall propose to modify the Class A license of Station KQYT(FM) to specify operation on the higher-powered channel. In accordance with the provisions of Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in the Green Valley modification, nor require that petitioner demonstrate the availability of an additional equivalent channel at Green Valley. In addition, we shall direct an *Order to Show Cause* to the licensee of Station KZMK(FM) at Bisbee, Arizona, as to why its license should not be modified to specify operation on Channel 222A.

8. Whenever an existing licensee is ordered to switch frequencies in order to accommodate a new channel allotment, Commission policy requires the benefiting party, or parties, to reimburse the affected station for costs incurred therewith. Therefore, if Channel 221C2 is allotted to Green Valley, petitioner will be required to reimburse Station KZMK(FM), Bisbee, Arizona for costs incurred in moving to Channel 222A. Petitioner has failed to provide such commitment in its proposal, and should do so in comments to be filed in response to the *Notice*. Failure to provide such commitment could result in a denial of the proposal.

9. In view of the above, the Commission invites comments on the proposal to amend Section 73.202(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Bisbee, Arizona	221A	222A
Green Valley, Arizona	221A, 246A	221C2, 246A

10. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Sierra-Pacific Broadcasting, Ltd., licensee of Station KZMK(FM), Bisbee, Arizona, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 222A in lieu of Channel 221A.

11. Pursuant to Section 1.87 of the Commission's Rules, Sierra-Pacific Broadcasting, Ltd. may, not later than **February 12, 1990,** file a written statement showing with particularity why its license should not be modified as proposed in the *Order to Show Cause*. The Commission

may call upon Sierra-Pacific Broadcasting, Ltd. to furnish additional information. If Sierra-Pacific Broadcasting, Ltd. raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Sierra-Pacific Broadcasting, Ltd. will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

12. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

Sierra-Pacific Broadcasting, Ltd.
Radio Station KZMK(FM)
3514 Kings Court
Sierra Vista, AZ 85635

Foundation for Creative Broadcasting, Inc.
Radio Station KXCI(FM)
220 South 4th Avenue
Tucson, AZ 85701

13. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

14. Interested parties may file comments on or before **February 12, 1990,** and reply comments on or before **February 27, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Michael L. Glaser, Esq.
Joseph P. Benkert, Esq
Gardner, Carton & Douglas
1001 Penn. Ave., NW
Suite 750
Washington, DC 20004

15. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202(b), 73. 504 and 73. 606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

16. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial com-

ments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Formerly Station KFXX-FM.

[2] We note that the collocation of Station KXCI(FM) to the tower of Station KUAT-TV to accommodate the Green Valley modification proposal on Channel 221 could preclude use of Channels 218, 219 and 220 in some portions of KUAT-TV's Grade B contour. It is our view that, although the upgrade of KXCI(FM) is part of the preclusive "package" put forward by the petitioner, preclusion caused by an upgraded KXCI is irrelevant. Our concerns with preclusion center on the preclusive effects of commercial broadcasters on noncommercial users, not on the effects of noncommercial users on other noncommercial users.

[3] In determining the precluded areas, petitioner should consider the service area of Station KXCI(FM) as though it presently operates with Class C2 facilities on Channel 217 at its intended site.

[4] Coordinates for Channel 221C2 at Green Valley are 31-56-04 and 110-55-52.

[5] Coordinates at the licensed site of Station KZMK(FM) are 31-28-52 and 109-57-30.

[6] Coordinates at the licensed site of Station KUAT-TV are 32-24-55 and 110-42-54.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-588

In the Matter of

Amendment of Section 73.202(b), RM-7161
Table of Allotments,
FM Broadcast Stations.
(St. James, Missouri)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 1, 1989; Released: December 22, 1989

By the Chief, Allocations Branch:

1. A petition for rule making has been filed by J. Eric Hoehn (petitioner), seeking the substitution of FM Channel 259C3 for Channel 258A at St. James, Missouri. Petitioner provided an engineering study in support of the proposal and indicated he would file an application for Channel 259C3.

2. We believe petitioner's proposal warrants consideration. Channel 259C3 can be allotted to St. James, Missouri, at petitioner's specified site, in compliance with the Commission's spacing requirements.[1] We shall also propose to modify the construction permit for Station KZYQ, Channel 258A, to specify operation on Channel 259C3 in accordance with Section 1.420(g) of the Commission's Rules (BPH-880112MB).

3. In order to provide wide coverage area service for the areas surrounding St. James, Missouri, the Commission PROPOSES TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
St. James, Missouri	258A	259C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **February 12, 1990,** and reply comments on or before **February 27, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

J. Eric Hoehn
KZYQ Radio
P.O. Box 7573
Columbia, Missouri 65205

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202(b), 73. 504 and 73. 606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It

should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 259C3 are 38-04-38 and 91-38-06.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 22, 1989

FEE DECISIONS OF THE MANAGING DIRECTOR AVAILABLE TO THE PUBLIC

The Managing Director is responsible for responding to requests for waiver or deferral of fees as well as other pleadings associated with the fee collection process. Typically, these responses to individuals are not published in the FCC Record (*See* 0.445(a) of the rules).

These decisions are available for public inspection. Periodically, the Managing Director releases a Public Notice listing the decisions he has made on these matters. The decisions are placed in General Docket 86-285. A copy of the decision is also placed in the appropriate docket, if one exists.

The following Managing Director decisions are released for information:

Abacus Broadcasting Corp. - Request for Refund Denied - Assignment of License Application for KJQN(FM) at Ogden UT (November 15, 1989)

Pacific Nationwide Cellular - Consolidated Petition for Reinstatement - MD Decided to Include in Lottery on a Contingent Basis -Dismissal of Rural Cellular Lottery Applications Due to Fee Defect (November 21, 1989)

North Communications of Puerto Rico - Request for Reconsideration of Managing Director's Decision of August 8, 1989 Denied - Application for a New Public Land Mobile Two-Way Radio Service (November 24, 1989)

NOTE: ANY QUESTIONS REGARDING THIS REPORT SHOULD BE DIRECTED TO THE PREPARER MICKEY WILLIAMS, ACTING CHIEF, FEE SECTION PH. 632-0241.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PAPAGO TRIBAL UTILITY AUTHORITY — AAD 9-1934

Petition for Waiver of an
Order Suspending Data Submissions

MEMORANDUM OPINION AND ORDER

Adopted: December 13, 1989; Released: December 22, 1989

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On June 30, 1989, The Papago Tribal Utility Authority (PTUA) filed a petition for waiver of the provisions of an order issued by the Common Carrier Bureau (the Bureau) that temporarily suspended, from September 30, 1988 through March 30, 1989, Section 36.612 of the Commission's Rules and Regulations.[1] Section 36.612 allows carriers to update information submitted to the National Exchange Carrier Association (NECA) for the computation of the Universal Service Fund (USF) payments.[2] PTUA desires to submit updated cost data to NECA to reflect substantial increases in central office and cable and wire facilities investment incurred as a result of high subscribership growth in its service area. For the reasons set forth below, we grant PTUA's petition.

II. BACKGROUND

2. The Commission established the USF to protect telephone subscribers in areas with unusually high non-traffic sensitive (NTS) costs. The USF provides an additional interstate allocation for carriers whose NTS loop costs exceed the national average by 115 percent or more. The Commission's rules require carriers to submit to NECA on June 30 of each year certain investment and expense information from the preceding calendar year used to compute the USF expense adjustment. Section 36.612 provides that carriers may update the information submitted to NECA, and sets the dates on which the carriers may submit the updated information. Carriers must provide updates on a quarterly basis covering specified portions of the preceding calendar year and the current calendar year. Based on these quarterly updates, NECA recomputes a study area's expense adjustment based on a revised twelve-month average.

3. Prior to January 1, 1988, the Commission's Uniform System of Accounts for telephone carriers were prescribed by Part 31 and the related separations procedures, which included the rules concerning the calculation of the USF, were prescribed by Part 67. Effective January 1, 1988, the Commission implemented Part 32, a new Uniform System of Accounts, and new related separations procedures in a new Part 36. The new Part 36 required carriers to submit data concerning the USF to NECA in compliance with Part 32 accounting rules. Because the 1988 USF data submission reflects 1987 costs, the carriers would be required to complete a complex mapping of their 1987 costs to the new Part 32 accounts. To eliminate the burdens associated with mapping, the *NECA Order* allowed the exchange carriers to use former Part 67 separations procedures to prepare their June 30, 1988, data submissions and allowed NECA to use former Part 67 separations procedures to compute the 1988 USF expense adjustment. The *NECA Order* also temporarily suspended the Section 36.612 optional quarterly updates which would have been based on both 1987 data under the former rules and 1988 data under the new rules.

III. PTUA'S PETITION

4. PTUA requests that we exempt it from the temporary suspension of Section 36.612, and allow it to update its 1988 USF data submission. PTUA states that it acquired the Sells, Arizona telephone exchange in 1987, and provided 1987 USF data in accordance with Parts 31 and 67 of the Commission's Rules. PTUA states, however, that since its acquisition of the telephone exchange, subscribership has increased from 400 to approximately 1,000 customers. This increased subscribership, PTUA states, has caused its investment in central office equipment and cable and wire facilities to increase 92% and 132% respectively. PTUA states that this increased investment has resulted in substantially higher total loop costs which justify an increase in USF payments to it. PTUA seeks to make quarterly updates for the period that includes data from January 1988 to September 1988.

5. PTUA asserts that the Section 36.612 provision for updates of USF data is intended to serve as a mechanism for exchange carriers to reflect significant changes in operations affecting their USF expense adjustment. PTUA states that it agrees with the *NECA Order*'s finding that exchange carriers should not generally be required to map data from one set of accounting rules to another. However, PTUA believes that in its case the burdens associated with this process are outweighed by the need to provide updated and timely USF data to NECA for computation of accurate USF payments to PTUA. PTUA states that it has restated its 1988 data to conform with the Part 31 and 67 rules, and it proposes to submit these data to NECA for recalculation of its USF payments. PTUA states that the impact of the updates is significant and important for the success of its expanded service program; however, the impact on a nationwide basis will be minimal. PTUA asserts that based upon informal discussions with NECA staff it appears that the average monthly increase in USF support for the period January through September 1989 would be approximately $3800 or less than .02% of the total USF support. PTUA states that no party will be harmed by a grant of its waiver. PTUA's petition was placed on public notice on August 7, 1989.[3] No comments were filed.

IV. DISCUSSION

6. Section 36.612 of the Commission's rules is intended to ensure that carriers whose NTS costs abnormally increase during the year have an opportunity to update their USF data so that they may receive the appropriate additional support. The *NECA Order* was not intended to eliminate the updating process for carriers experiencing

significant increases in costs. Rather, that order was intended to remove the burdens on the carriers and NECA of mapping costs from one accounting and separations system to another. PTUA has already undertaken the burden associated with mapping, and, in PTUA's case, these burdens are outweighed by the benefits PTUA will receive if its waiver request is granted. The burden on NECA of recomputing the USF expense adjustment for one company is minimal. Grant of this waiver will enable PTUA to receive increased assistance to defray costs incurred in providing service to a greatly expanded customer base, and will promote the USF goal of nationwide availability of telephone service at reasonable rates. For those reasons, we grant PTUA's petition.

V. ORDERING CLAUSE

7. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), That the petition filed by the Papago Tribal Utility Authority on June 30, 1989, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] *See* National Exchange Carrier Association, Inc., Petition for Waiver of Sections 36.601(b), 36.611, 36.612 and 36.621 of the Commission's Rules, 3 FCC Rcd 4018 (Com. Car. Bur. 1988) (*NECA Order*).

[2] 47 C.F.R. Section 36.612.

[3] *Public Notice*, The Papago Tribal Utility Authority Files Petition for Waiver of Common Carrier Bureau Order, 4 FCC Rcd 6132 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MIDAMERICAN LONG
DISTANCE COMPANY,
Complainant,

v. File No. E-89-409

GTE MTO, Inc.,
Defendant.

ORDER

Adopted: December 14, 1989; Released: December 22, 1989

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On September 29, 1989, MidAmerican Long Distance Company ("MidAmerican") filed the above-captioned formal complaint against GTE MTO, Inc. (the "Defendant") seeking reimbursement and "other appropriate relief" for interstate access charges levied by the Defendant against MidAmerican during the period from October 1, 1985 through December 31, 1986. In accordance with Commission rules governing formal complaint proceedings, Defendant's answer to the complaint was due on November 24, 1989. On December 5, 1989, however, MidAmerican filed a motion for leave to withdraw its complaint, stating that discussions with Defendant's counsel subsequent to the filing of the complaint established that MidAmerican did not receive access services from the Defendant during the October 1, 1985 through December 31, 1986 time period.

2. On the basis of the statements contained in the Motion, we conclude that there are no longer issues in controversy for the time period covered by the complaint and that this proceeding should be terminated.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that MidAmerican's Motion for Leave to Withdraw complaint IS GRANTED, and that the above-captioned proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MIDAMERICAN LONG
DISTANCE COMPANY,
Complainant,

v. File No. E-89-413

THE CONTINENTAL
TELEPHONE COMPANIES,
Defendant.

ORDER

Adopted: December 14, 1989; Released: December 22, 1989

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On September 29, 1989, MidAmerican Long Distance Company ("MidAmerican") filed the above-captioned formal complaint against The Continental Telephone Companies (the "Defendant") seeking reimbursement and "other appropriate relief" for interstate access charges levied by the Defendant against MidAmerican during the period from October 1, 1985 through December 31, 1986. In accordance with Commission rules governing formal complaint proceedings, Defendant's answer to the complaint was due on November 24, 1989 and an answer and motion to dismiss were duly filed. On December 5, 1989, however, MidAmerican filed a motion for leave to withdraw its complaint, stating that subsequent to the filing of the complaint it determined that MidAmerican did not receive access services from the Defendant during the October 1, 1985 through December 31, 1986 time period.

2. On the basis of the statements contained in the Motion, we conclude that there are no longer issues in controversy for the time period covered by the complaint and that this proceeding should be terminated.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that MidAmerican's Motion for Leave to Withdraw Complaint IS GRANTED, and that the above-captioned proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

An Allocation of One-Half MHz in the 216 - 222 MHz Band for a TV Viewer Response System. RM-6196

ORDER GRANTING EXTENSION OF TIME

Adopted: December 8, 1989; Released: December 11, 1989

By the Office of Engineering and Technology:

1. TV Answer, Inc., the petitioner for one-half megahertz in the 216 - 222 MHz band, requests an extension of the reply period that was established for two supplemental filings in this proceeding. *See* Public Notice 4551, released September 25, 1989. The supplemental filings contained engineering data gathered by TV Answer, Inc. in support of its petition.

2. TV Answer states that it requires additional time to analyze and address the questions raised by commenting parties. TV Answer believes that a brief extension would not prejudice any party other than itself, and it indicates that the commenting parties would not object to an extension.

3. The Commission is interested in obtaining as complete a record as possible before acting on the subject petition. We believe that additional time for filing reply comments is appropriate in light of the complexity of the issues raised in this proceeding. Accordingly, pursuant to authority found in Section 4(i), 302, and 303 of the Communications Act of 1934, as amended, IT IS ORDERED that the reply period for responding to TV Answer's supplemental filings IS EXTENDED to December 18, 1989.

FEDERAL COMMUNICATIONS COMMISSION

Thomas P. Stanley
Chief Engineer

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-75

In the Matter of

Provision of Aeronautical Services
via the INMARSAT System.

EXTENSION OF TIME

Adopted: December 13, 1989; Released: December 14, 1989

By the Chief, Common Carrier Bureau:

1. American Mobile Satellite Corp. (AMSC) has filed a request for extension of time from December 18, 1989 to January 8, 1990 to file a response to the Petition for Reconsideration filed by British Telecommunications plc (BT) in the captioned matter. AMSC also requests that the time for filing of replies be extended to January 26, 1990. AMSC states that the issues involved are extremely complex and an extension of time is necessary to comprehensively respond to the issues raised by the BT petition and coordinate those responses with responses to similar issues raised by Aeronautical Radio, Inc. and Air Transport Assn. (collectively, ARINC) in a separate proceeding (ISP-90-002). AMSC states that it has contacted counsel for BT, ARINC, and Comsat, none of whom object to the request for extension.

2. Good cause has been shown for grant of the instant request. The complexity and importance of the issues raised by both BT's petition in this proceeding and by ARINC's petition in ISP-90-002 warrant the requested extension of time to prepare comprehensive and coordinated responses. We are simultaneously granting AMSC's request to extend the dates for filing responses to the ARINC petition.

3. Accordingly, IT IS ORDERED that the request of AMSC is granted, and the time for filing of responses to the Petition for Reconsideration filed by BT in the captioned matter is extended to January 8, 1990, and the time to reply is extended to January 26, 1990.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Provision of Aeronautical Services via the INMARSAT System. File No. I-S-P-90-002

EXTENSION OF TIME

Adopted: December 13, 1989; Released: December 14, 1989

By the Chief, Common Carrier Bureau:

1. American Mobile Satellite Corp. (AMSC) has filed a request for extension of time from December 22, 1989 to January 8, 1990 to file a response to the Request for Waiver filed by Aeronautical Radio, Inc. and Air Transport Assn. (collectively, ARINC) in the captioned matter. AMSC also requests that the time for filing of replies be extended to January 26, 1990. AMSC states that the issues involved are extremely complex and an extension of time is necessary to comprehensively respond to the issues raised by ARINC and coordinate those responses with responses to similar issues raised by the British Telecommunications plc Petition for Reconsideration in CC Docket No. 87-75. AMSC states that it has contacted counsel for BT, ARINC, and Comsat, none of whom object to the request for extension.

2. Good cause has been shown for grant of the instant request. The complexity and importance of the issues raised by both ARINC's petition and the BT petition in CC Docket No. 87-75 warrant the requested extension of time to prepare comprehensive and coordinated responses. We are simultaneously granting AMSC's request to extend the dates for filing responses to the BT petition.

3. Accordingly, IT IS ORDERED that the request of AMSC is granted, and the time for filing of responses to the Request for Waiver filed by ARINC in the captioned matter is extended to January 8, 1990, and the time to reply is extended to January 26, 1990.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-582

In the Matter of

Primary and Secondary Exchange Carrier Billing and Revenue-Sharing Arrangements in Access Tariffs

ORDER

Adopted: December 18, 1989; Released: December 26, 1989

By the Chief, Common Carrier Bureau:

1. In December 1987, the Common Carrier Bureau (Bureau) designated various issues for investigation concerning billing and revenue-sharing arrangements for the joint provision of Feature Group A (FGA) and Feature Group B (FGB) access services.[1] Such arrangements exist in multicarrier areas where two or more local exchanges are served by different local exchange carriers (LECs). Through FGA extended area service or an FGB access tandem network arrangement, interexchange carriers (ICs) obtain access to the entire multicarrier network through a line or trunk which connects their switch with an end office switch or access tandem of only one of the LECs. That LEC is the primary exchange carrier. The LEC whose customers can access the IC point of presence (POP) in the primary exchange is the secondary exchange carrier.

2. The Bureau determined, in the *Designation Order*, that the Commission's present reporting and access tariff filing requirements may not provide the Commission with sufficient information to assure proper secondary carrier cost recovery. *Designation Order*, 2 FCC Rcd at 7544. Therefore, the Bureau initiated this proceeding to determine whether carriers should be required to include information in their tariffs regarding any billing and revenue-sharing arrangements in which they are participating.[2]

3. Subsequent to the release of the *Designation Order*, the Bureau initiated a separate proceeding to formulate guidelines to govern how customers in multicarrier areas would be billed by the LECs providing service. The mechanism for rendering bills to customers in multicarrier areas is referred to as "meet point billing." The first meet point billing guidelines were established by the Commission for Feature Group C (FGC) and Feature Group D (FGD) access services.[3] In a separate Order,[4] the Bureau established the same meet point guidelines for Feature Group B (FGB), but declined to do so for Feature Group A (FGA). Instead, the Bureau required LECs that are jointly providing FGA access services to enter into revenue-sharing agreements.[5] In regard to the latter agreements, the Bureau urged carriers to negotiate in good faith and required that the agreements be designed to establish access rates that will recover both the primary and secondary carriers' costs, that the settlement revenue from these agreements be reflected in the calculation of interstate access rates and charges, that the agreements be negotiated and signed not later than October 5, 1990, and that the agreements be implemented within six months of the date of signature.[6]

4. We believe that the establishment of these requirements for both FGA and FGB access services vitiates the need to continue this investigation of primary and secondary carrier billing and revenue-sharing agreements, and that it would be in the public interest if Commission resources are no longer expended on this proceeding. By requiring LECs which are jointly providing FGA access services to enter into revenue-sharing agreements, the Bureau essentially found those arrangements not involving revenue-sharing agreements to be unlawful.[7] Furthermore, by establishing meet point billing guidelines for jointly-provided FGB access services, we made all primary and secondary carrier revenue-sharing arrangements for FGB service unnecessary. Thus, the issues designated for investigation in this proceeding are moot.

5. Accordingly, IT IS ORDERED that the proceeding in CC Docket No. 87-582 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Primary and Secondary Exchange Carrier Billing and Revenue-Sharing Arrangements in Access Tariffs, CC Docket No. 87-582, 2 FCC Rcd 7544 (Com.Car.Bur. 1987) (*Designation Order*).

[2] *See Designation Order* for a more complete recitation of the facts concerning this investigation. 2 FCC Rcd at 7544.

[3] Waiver of Access Billing Requirements and Investigation of Permanent Modifications, CC Docket No. 86-104, Memorandum Opinion and Order, 2 FCC Rcd 4518 (1987). These guidelines require LECs to adopt one of four different billing options: single bill/multiple tariff; single bill/pass through tariff; single bill/single tariff; or multiple bill/multiple tariff. In addition, all LECs involved in providing access service for a particular meet point must agree on one alternative in order to implement the single billing option. We note here that the Commission determined that the single billing option, in one of its three forms, is preferable to the multiple billing option because the former enhances billing accuracy and customer convenience in access service bill verification. *Id.* at 4519.

[4] Access Billing Requirements for Joint Service Provision, CC Docket No. 87-579, Memorandum Opinion and Order, 4 FCC Rcd 7183 (Com.Car.Bur. 1989) (*Meet Point Billing II*).

[5] *Id.* at 7185-86.

[6] *Id.*

[7] The Bureau did, however, allow those primary and secondary carrier arrangements not involving revenue-sharing agreements to continue until those LECs using them negotiate and sign revenue-sharing agreements.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-339

In the Matter of

Establishment of a Program
to Monitor the Impact of
Joint Board Decisions

MEMORANDUM OPINION AND ORDER

Adopted: December 5, 1989; Released: December 26, 1989

By the Commission:

I. INTRODUCTION

1. This Order prescribes the report carriers shall file to permit us to monitor jurisdictional shifts in revenue requirements that may have resulted from the simplification of the separations rules and conformance of those rules to the revised accounting rules. As part of the monitoring program in this docket,[1] we have required certain local exchange carriers (LECs) to report the jurisdictional shifts in revenue requirements that may have resulted from the implementation of the revised Separations Manual we adopted in May 1987.[2] We released the *Order on Reconsideration* on July 19, 1988, which clarified our method for reporting jurisdictional shifts in revenue requirements. That Order states that any LEC reporting jurisdictional shifts may report data using a modeling approach rather than report actual data, and that we would establish a modeling technique to be used by all carriers.[3] We requested that the parties that had proposed that we allow modeling, the United States Telephone Association (USTA), Pacific Bell and Nevada Bell (Pacific), the Ameritech Operating Companies (Ameritech), and the Southwestern Bell Telephone Company (SW Bell), submit suggested techniques for our review. Several parties filed comments concerning the reporting requirements for jurisdictional revenue requirement shifts.[4] For the reasons discussed below, we require all Tier I carriers[5] experiencing jurisdictional revenue requirement shifts of 5 percent or greater to file reports within thirty days of release of this Order using the form set forth in Appendix A, *infra*. Other carriers experiencing jurisdictional revenue requirement shifts of 5 percent or greater may file these reports on an optional basis.

II. BACKGROUND

2. In August 1987, in Docket No. 87-339, we adopted the recommendation of the Docket 80-286 Joint Board that we establish a program to monitor the impact of the recent changes in the subscriber line charge, high cost assistance program, common line pooling system, and the lifeline assistance program.[6] We also adopted the recommendations of the Docket 86-297 Joint Board that we include in this monitoring program a review of the revenue requirement impacts that may result from our decision to revise the Separations Manual, currently codified in Part 36 of our Rules, to conform it to the revised Uniform System of Accounts (USOA) that became effective January 1, 1988, and to simplify the separations process.[7]

3. In Docket No. 86-297, the Joint Board collected data to assess the revenue requirement impact of proposals for revision of the Manual. The Docket 86-297 Joint Board believed that, with the exception of the changes in jurisdictional separations rules recommended by the Docket 80-286 Joint Board, its recommended changes in the separations rules would satisfy its stated objectives of conformance and simplification with minimal impact on revenue requirements.[8] This conclusion was based on 1985 data for 184 study areas representing approximately 90 percent of the total revenue requirements of all exchange carriers. Nevertheless, the Docket 86-297 Joint Board recommended that this Commission include an evaluation of the effects of the revised procedures on the industry and the public in the monitoring program recommended by the Docket 80-286 Joint Board.[9] The Docket 86-297 Joint Board stated that this monitoring program would allow interested parties to provide pertinent information regarding its recommended rule revisions.

4. In the *Monitoring Recommended Decision and Order*,[10] the Docket 80-286 Joint Board stated that, to monitor the effects of the revised rules when implemented, we should require LECs to report annually for two years any jurisdictional shift in total revenue requirement that is 5 percent or more of the annual total revenue requirement for a study area. The Docket 80- 286 Joint Board stated that LECs should report this information in March 1989 for the 1988 revenue requirement shifts and in March 1990 for the 1989 revenue requirement shifts.[11] The Docket 80-286 Joint Board expressly stated that it was only "interested in identifying the revenue requirement impact resulting from conformance of the separations rules to the new accounting rules and from simplification of the separations rules."[12] Thus, it stated that the LEC reports should exclude any revenue requirement shift resulting from the implementation of the changes we adopted in the Docket 80-286 proceeding, including changes regarding Central Office Equipment (COE) and Revenue Accounting Expenses, stating that those changes will have substantial impacts on revenue requirements. The Docket 80-286 Joint Board added that LECs with jurisdictional shifts of less than 5 percent need not file a report.[13]

5. We decided to allow LECs to report data based on a model rather than report actual data and requested that interested parties submit suggested modeling techniques.[14] The Chief of the Common Carrier Bureau (Bureau) subsequently granted USTA's request to extend the date for filing 1988 data from March 1, 1989, to May 1, 1989.[15] On April 4, 1989, the Bureau granted USTA a further extension of time from May 1, 1989, until thirty days after the date on which we release the jurisdictional revenue requirement monitoring report form and guidelines.[16]

III. SUMMARY OF COMMENTS

6. USTA proposed that Tier I carriers report certain information to serve as the basis for the monitoring of the potential revenue requirement impacts of the revised Separations Manual. All Tier I companies would report jurisdictional revenue requirement shifts, even those below the 5 percent threshold. Other companies would not be required to file reports but would do so on an optional basis. AT&T agrees with USTA's suggestion that the reporting requirement be optional for these other carriers.[17] USTA also proposes that the report of 1989 data, currently due in March 1990, be eliminated, and that we require only one report in 1989. USTA's proposed report would compare the interstate allocations for 1988 with the interstate allocations for 1987, the last year that the former Part 67 Separations Manual was in effect. The USTA report would allow carriers to report annualized data rather than actual calendar year data. USTA believes that these reports would allow us to determine the jurisdictional revenue requirement shifts that are at or above the 5 percent threshold. USTA's report would require carriers to provide aggregated data regarding return, expenses, and taxes for 1987 and 1988 and would exclude the impact of changes not related to conformance, including the effects of changes in the separations rules applicable to COE and Revenue Accounting Expenses.[18]

7. USTA says its proposal would minimize the reporting burdens imposed on the industry because it would be optional for Tier II carriers. USTA intends, however, to encourage the Tier II carriers with jurisdictional shifts of 5 percent or more of their total revenue requirements to provide this Commission with completed reports with the same level of detail as the Tier I carriers. USTA believes that carriers will not be able to obtain the necessary data without the undue burdens associated with special studies. USTA states that Tier I carriers typically conduct monthly separations studies or updates, whereas most of the Tier II carriers perform these studies annually and, therefore, the requisite data will not be available for these carriers until late 1989.

8. Pacific, Ameritech, SW Bell,[19] BellSouth, US West, NYNEX, Bell Atlantic, and GTOC support USTA's approach. AT&T and MCI believe, however, that USTA's proposal should include more disaggregated and detailed data and DC urges us to reject USTA's approach. USTA responds to AT&T and MCI by stating that its proposed report exceeds the level of detail required in the *Monitoring Recommended Decision and Order*. AT&T asserts that the model should illustrate why significant or anomalous jurisdictional shifts have occurred. Specifically, AT&T notes that an aggregate 5 percent shift in jurisdictional revenue requirement in a study area could be the result of a change in the interstate assignment of a single account or the net result of changes in the apportionment of several accounts.[20]

9. AT&T suggests that the reports provide more disaggregated data regarding investments, expenses, and taxes.[21] AT&T does not believe that its suggested format would be more burdensome to prepare than USTA's model. AT&T does believe that its suggested format will allow for the determination of conformance and simplification shifts at little cost. AT&T states that the output from its proposal would provide the detail necessary for a meaningful analysis, and would illustrate, more precisely and concisely, the effects of simplification and conformance.[22] AT&T also asserts that the reporting procedures should be unambiguous and detailed enough to ensure consistency and comparability of the results among the carriers.[23] In particular, AT&T proposes that the modeling methodology we adopt be structured and defined to ensure that the techniques the carriers use to map costs from the former Part 31 accounts to the new Part 32 accounts do not create jurisdictional shifts independent of the conformance rules.[24] USTA, Ameritech, and BellSouth believe that USTA's modeling procedures are consistent without requiring additional mapping of accounts as AT&T has suggested.

10. MCI asserts that a model must contain sufficiently disaggregated results to indicate precisely in which investment and expense categories an impact has occurred. MCI argues that aggregated results would not report jurisdictional revenue requirement shifts that might reveal serious problems with the conformance rules because shifts in revenue requirements for various categories could offset each other and, under an aggregated modeling technique, none of the shifts would be reported. In addition, MCI argues that USTA's modeling approach provides no indication of whether a shift in a carrier's revenue requirement is the direct result of a change in the assignment of a single account or the net result of changes in the assignment of several accounts. MCI contends that this is a serious shortcoming because a determination of the significance of jurisdictional shifts should be based on the source of such shifts.

11. USTA, Ameritech, US West, Bell Atlantic, Pacific, BellSouth, SW Bell, and GTOC believe that a modeling approach requiring more detail or disaggregated data would be unduly burdensome and would not yield more accurate results. Bell Atlantic believes that a greater level of detail would track minor changes in account values even if those changes are offsetting and have no effect on overall company revenue requirements. SW Bell believes that the proposed expansion of the report would create a financial analysis and reporting procedure that would require LECs to make public competitively useful information that is completely irrelevant to the monitoring of jurisdictional revenue requirement shifts. Ameritech and BellSouth contend that, if substantial jurisdictional revenue requirement shifts occur, the interests of AT&T and MCI would be protected because the Joint Board has expressed its intention to request that the LECs submit additional data segregated by accounts and reported on a quarterly basis.[25]

12. AT&T suggests that we clarify the *Order on Reconsideration* concerning the criteria for reporting the jurisdictional revenue requirement shifts.[26] In its comments, AT&T proposes that we apply the 5 percent threshold to disaggregated cost groups. AT&T argues that if carriers are allowed to apply the 5 percent threshold in the aggregate, cost shifts will offset each other and will be unreported, even though such shifts may indicate serious potential problems with the conformance rules.[27] AT&T states, however, that in some cases, a shift to the interstate jurisdiction could increase the interstate revenue requirement by up to 25 percent but would not require a report because the amount shifted is less than 5 percent of the total revenue requirement for the study area. AT&T believes that such an interpretation of our decision would result in insensitive reporting. In reply comments, AT&T argues that the 5 percent threshold is arbitrary and unnecessary. AT&T further argues that the elimination of the 5 percent threshold will enhance the completeness, accu-

racy, and comparability of the reports and will allow for aggregation of meaningful estimates of total shifts and promote rapid solutions to any problematic shifts that are revealed.[28]

13. AT&T recommends several alternatives to USTA's modeling approach and believes that a model that meets our requirements should satisfy several criteria. First, AT&T believes that the model should not include cost shifts caused by the separations changes we adopted in Docket No. 80-286 because those rule changes are not related to conformance and are expected to cause substantial shifts in revenue requirements. Second, AT&T believes that, the model must minimize the distortions caused by the use of surrogate data to calculate revenue requirement impacts and, if surrogate data are used in the models, such data should be adjusted to eliminate the effects of changes unrelated to conformance, such as changes in operations, growth, or levels of expenses. Third, AT&T believes that carriers should be required to maintain the support materials used in calculating their monitoring data in an understandable format and these materials should be available on request. Fourth, AT&T contends that the models should enable carriers to determine the cause or causes of significant or anomalous jurisdictional revenue requirement shifts.

14. SW Bell contends that AT&T's suggestion that the model eliminate the effects of changes unrelated to conformance that may cause costs to shift, such as changes in operations, growth, or levels of expense, would defeat the purpose of adopting a modeling approach that estimates jurisdictional revenue requirement shifts. SW Bell further contends that AT&T has not demonstrated how the LECs would identify the changes in circumstances that the carriers would have to identify to ensure that the data are significant. BellSouth states that USTA's model eliminates the effects of these changes, as AT&T contends it should, because it compares the overall percentage of revenue requirements assigned to the interstate jurisdiction rather than comparing 1987 dollars with 1988 dollars. In addition, USTA asserts that because its model leads directly to the percentage of total revenue requirement that is allocated to the interstate jurisdiction, possible shifts caused by changes in operations, usage growth, or levels of expense are accounted for and need not be separately excluded. SW Bell notes that USTA's proposal already includes a direction that carriers make adjustments for other significant changes that would distort the results of its proposed method.

15. Virtually all parties agree that Tier I and Tier II carriers should use the same report for filing purposes.[29] USTA, Pacific, SW Bell, NYNEX, Bell Atlantic, and GTOC believe that one report, submitted in 1989, would be sufficient for us to evaluate the revenue requirement shifts resulting from conformance of the Separations Manual. USTA notes that its report assumes 1987 as the base year for the comparison of data because the new Separations Manual became effective as of January 1, 1988. USTA states that, by the time the 1988 data are compiled, any shifts due to conformance changes will have been identified, thus rendering the 1990 report extraneous. In addition, USTA states that it does not expect any revenue requirement shifts to occur between 1988 and 1989 as a result of conformance.

16. AT&T and DC oppose any change in the two-year filing requirement. AT&T believes that the second report would provide us with an opportunity to monitor cost trends affecting separations factors that may not have been apparent after the first year. AT&T comments that we should investigate any inconsistencies between the 1989 and 1990 reports to determine whether conformance has created problems or whether the inconsistencies are due to other factors. DC also believes that the one-time filing requirement that USTA has recommended would not be appropriate if annualized data are used. DC recommends instead that the Commission require that the base year 1987 be determined by the use of calendar year information rather than annualized information because the annualization of monthly or quarterly data may not recognize material seasonal shifts and other externalities and may not reveal the impact of separations conformance as accurately as calendar year data. DC suggests that if annualized data are used, the 1990 report should include actual calendar year data for 1987 and 1988, in addition to annualized data for 1987. USTA replies that the reporting carriers will develop their submissions using actual data for a representative period as a base for annualized data in accordance with accepted industry practices and procedures. USTA also states that any annualized data will meet the Joint Board's concern that the data used be representative.

17. MCI recommends that we require the LECs to submit, as an annotation to their annual Automated Reporting Management and Information System (ARMIS) filings, any jurisdictional shifts in revenue requirements that have occurred. MCI argues that this method would satisfy its concerns about identifying specific impacts of revenue requirement shifts on each affected investment and expense category. MCI asserts that to avoid the use of obsolete data, the input data used in any model should not be more than one-year old and it should be updated as often as possible.

18. SW Bell states that MCI's recommendation would require the maintenance of duplicate systems of account and duplicate separations systems,[30] would miss the point of the monitoring plan, and has already been found to be unjustified by this Commission. SW Bell also opposes MCI's suggestion that the LECs be required to update data for the model as often as possible. SW Bell contends that even if the LECs are required to submit two reports, the 1987 data will not be changed. GTOC and USTA maintain that MCI's proposal that the report should not only illustrate the specific impact of a separations change, but also detail the specific impacts of such a change on each affected investment or expense category is contrary to this Commission's monitoring objectives. Ameritech contends that because USTA's model uses the most currently available annualized actual data for representative periods, no distortions resulting from the use of surrogate data will occur and the model will produce verifiable output. Furthermore, BellSouth states that because much of the data input into the model would have already been filed with this Commission as part of ARMIS, it will cooperate in the event that we need additional supporting data to further verify USTA's model.

19. Ameritech and Pacific believe that the USTA report can be developed within the number of hours estimated by the Commission in its request for approval by the Office of Mangement and Budget (OMB) for this aspect of the monitoring program. GTOC recommends that we amend the filing requirement to permit non-Bell Tier I LECs to perform the jurisdictional analysis on a representative sample of study areas. GTOC notes that the

filing requirement appears to be reasonable for the regional Bell Operating Companies, which are each comprised of a small number of very large study areas, but argues that for a non-Bell Tier I LEC, such as itself, with many study areas of varying sizes, the filing requirement is unnecessarily burdensome. GTOC further argues that compliance with the reporting requirement would require approximately 120 hours per study area, or 3,700 hours in total for all thirty-one of its study areas. In addition, GTOC notes that over two-thirds of this time would be devoted to the collection of data from twenty-one study areas which represent less than a quarter of its interstate revenue requirement.

20. DC asserts that USTA's model is flawed because it produces percentage point changes instead of percentage changes.[31] DC contends that, because the Commission is interested in changes of 5 percent or more, the USTA model might cause companies to ignore changes that are more than 5 percent but are less than 5 percentage points.[32] DC also asserts that USTA's model should be modified to show that the 1988 amount subject to separations was derived from the total company amount, excluding changes not related to conformance, rather than from the total company amount subject to separations.

21. As an *ex parte* filing, NARUC filed a resolution[33] requesting that we expand the monitoring program to include an assessment of the cumulative revenue requirement impact of all separations changes adopted in Docket Nos. 86-297 and 80-286. Specifically, NARUC requests that we solicit data that include the interstate allocation factors for 1986, 1987 and 1988 and that quantify the revenue requirement impact of all changes in interstate allocation factors due to rule changes or other factors. NARUC also requests that we require the same data for 1989 when available.

IV. DISCUSSION

22. The Joint Boards recommended a monitoring requirement to assess, on a nationwide aggregated basis, the jurisdictional revenue requirement impact of only those changes to the Separations Manual that were necessary either to conform the manual to the new accounting rules or to simplify separations procedures. To meet the objectives of this Commission and both Joint Boards in the monitoring program, we require that Tier I carriers report jurisdictional revenue requirement shifts of 5 percent or greater resulting from the adoption of the revised Separations Manual by completing the reporting form contained in Appendix A and using the guidelines set forth in Appendices A and B, *infra*. All other carriers experiencing jurisdictional revenue requirement shifts of 5 percent or greater may file reports on an optional basis but, if they choose to file, those carriers must also use the form contained in Appendix A. The use of one format and consistent methodologies by all reporting carriers will facilitate the aggregation and comparison of data. Reporting carriers that experience jurisdictional shifts of 5 percent or greater in calendar year 1988 must report those shifts within thirty days of the release of this Order. After reviewing those reports, the Bureau will determine whether to require an additional report for calendar year 1989. We believe that this reporting requirement will ensure that we have adequate information to evaluate the impact of the revised separations rules for the nation as a whole, since the Tier I carriers represent approximately 90 percent of the total, nationwide revenue requirement.[34] Because the data filed in this proceeding will indicate whether any significant jurisdictional shifts have occurred for most of the nation's revenue requirement, this reporting requirement will enable us to assess the overall, nationwide impact of separation conformance and simplification.

23. We require that all carriers reporting jurisdictional revenue requirement shifts use the reporting form contained in Appendix A. That reporting form, which is in part based on USTA's proposal and the comments received in this docket, requires carriers to report data regarding investment, reserves, expenses, and taxes. We require carriers to use these data to calculate total unseparated and interstate revenue requirements for 1987 using the former Part 67 rules and for 1988 using the Part 36 rules. We also require carriers to identify certain separations changes unrelated to conformance and simplification in accordance with the guidelines in Appendices A and B to calculate the impact of conformance of the Separations Manual by subtracting the changes unrelated to conformance and simplification from the difference between 1987 and 1988 revenue requirements. We believe this form will allow us to evaluate the revenue requirement impact of the revised separations rules, while appropriately excluding the effects of the changes in the separations rules we adopted in Docket No. 80-286, including changes in COE and Revenue Accounting Expenses.[35] We will not require, as suggested by AT&T and MCI, that data be disaggregated further than that required by our report. We believe that the reporting of overall revenue requirement impacts for the major cost groupings, on an aggregated basis, will allow us to assess the effect of the revised Separations Manual in a particular jurisdiction. As the Docket 80-286 Joint Board stated in the *Monitoring Decision and Order*:

> The annual filing of data identifying shifts in *total revenue requirements* due to the CC Docket No. 86-297 conformance and simplification of the separations procedures will be sufficient to identify any unintended effects of new separations procedures. Therefore, we believe that a request for more detailed information . . . would be unnecessarily burdensome for participating LECs. If the reported jurisdictional shifts in revenue requirements prove to be substantial, however, we may ask LECs to submit additional data segregated by accounts and reported on a quarterly basis to allow consideration of possible corrective actions.[36]

Moreover, in Docket No. 86-297, we adopted certain separations changes that we recognized would cause significant jurisdictional shifts in revenue requirements when viewed individually. We expected, however, that conformance and simplification would be achieved with minimal impacts on revenue requirements for the Separations Manual as a whole.[37]

24. We agree with the Docket 80-286 Joint Board's conclusion that the reporting of aggregated data will enable us preliminarily to assess the impact of the revised Manual. We may require more disaggregated data if these reports indicate that significant jurisdictional shifts in revenue requirements have occurred.[38] At this time, however, there is no reason to impose unduly burdensome

and costly reporting requirements on the carriers. We accordingly deny the request of AT&T and MCI that we require more disaggregated data. We also deny MCI's request that we require Tier I carriers to report jurisdictional revenue requirement impacts as an annotation to their annual ARMIS filing. Such a requirement would not further our objectives.

25. We decline to adopt AT&T's suggestion that we eliminate the 5 percent threshold. We believe that reports of 5 percent or greater shifts in revenue requirements from the Tier I carriers will provide us adequate information to evaluate the overall, nationwide impact of separations conformance. Data for carriers experiencing shifts of less than 5 percent will not significantly affect the total nationwide impact of separations conformance and simplification. We therefore decline to require those carriers to report at this time, but will consider requiring further data after reviewing the data filed by the other carriers. We also decline to adopt AT&T's suggestion that the 5 percent threshold be applied to major accounts or cost groups, rather than to overall revenue requirements for each study area. We adopted a monitoring program to assess the overall impact of separations changes. AT&T's suggestion would produce data that would not be necessary or useful for that purpose. We accordingly require that carriers apply the 5 percent threshold to the total unseparated revenue requirements for each study area.[39]

26. We also decline to adopt NARUC's suggestion that we expand this proceeding to include an assessment of the cumulative revenue requirement impact, for calendar years 1986, 1987, 1988, and 1989, of all the separations changes adopted by both Joint Boards. We previously denied a similar request by the New York State Department of Public Service, and stated that:

> Neither the Joint Board, nor this Commission, intended the monitoring program to be a comprehensive, all-encompassing review of the impact of every recent separations decision. Both Joint Boards and this Commission instead intended the program to be a review of certain specific changes in this Commission's rules that the Joint Board estimated would have certain expected impacts. The request for reports of jurisdictional shifts in revenue requirements was intended to confirm that the impact of separations conformance to accounting changes and of separations simplification would be as the Joint Board and this Commission expected.[40]

We also stated that the impact of the separations changes we adopted in Docket No. 80-286 was fully evaluated by that Joint Board and was thoroughly considered by this Commission when we adopted the Joint Board's recommendations. We also adopted certain measures to prevent adverse revenue requirement impacts, including a transition to the new separations procedures for Category 3 COE and a weighting of the Category 3 COE allocation factor for small carriers. Thus, we stated that the issue of the revenue requirement impacts of those jurisdictional separations changes were fully considered and adequately addressed in that proceeding and need not be revisited.[41] For these reasons, we decline to adopt NARUC's suggestion that we expand the monitoring of jurisdictional revenue requirement impacts.

27. We require that, thirty days from release of this Order, carriers file the reports for the 1988 calendar year. We delegate authority to the Common Carrier Bureau to determine, after reviewing those reports, whether reports for 1990 will be necessary for us to evaluate the impact of separations conformance and simplification. Accordingly, we decline to adopt USTA's suggestion that we eliminate the 1989 report at this time. We also allow carriers to file either actual, calendar year data or annualized data. We believe that the use of data that is properly annualized will accurately reflect annual operations, thus meeting DC's concerns.[42] Moreover, we caution reporting carriers to use appropriate and accepted annualizing practices to ensure that the results are reflective of actual calendar year operations. In addition, as stated above, we may seek more detailed data in all cases in which our review of the aggregated, annualized data indicates the need for such data. We will not, at this time, require carriers to update the reported data, as suggested by MCI, because we can seek updated data at a later date if the filed data indicate the need for further information.

28. We deny GTOC's request that we allow non-Bell companies to file a report only for a sample of their study areas. Although we recognize that certain Tier I companies, such as GTOC, serve many study areas, we do not believe that a decreased reporting requirement for such companies will allow us to assess the nationwide impact of separations conformance. We also decline to adopt AT&T's suggestion that we require carriers to report the methodology they used to map costs from the former Part 31 USOA to the revised Part 32 USOA. We are constantly monitoring the carriers' implementation of the new accounting rules to ensure that mapping techniques are consistent. We do not need such information with this particular report.

V. PAPERWORK REDUCTION ACT

29. The Office of Management and Budget (OMB) has approved the collection of information contained in this Order. The OMB control number for this collection of information is 3060-0391 which expires September 30, 1990.

VI. FILING REQUIREMENTS

30. We require that all reporting carriers file the report contained in Appendix A and using the instructions set forth in Appendices A and B. To facilitate the submission of the data, we have provided a computer disk that contains the data request in the format of a spreadsheet file. The first page of the data request contains specific instructions for the completion of the worksheet. We require that all reporting carriers file two hard copies of the report with the Secretary of the Commission, deliver one hard copy and one diskette to the Commission's copy contractor, International Transcription Service, 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, (202) 857-3800; and deliver one hard copy and one diskette to Diane Shaw-Gill, Accounting and Audits Division, Common Carrier Bureau, Federal Communications Commission, 2000 L Street, N.W., Suite 257, Washington, D.C. 20554; and one hard copy to each Joint Board Commissioner and staff person listed in Appendix C.

VII. ORDERING CLAUSES

31. Accordingly, IT IS ORDERED, That the jurisdictional revenue requirements monitoring report is ADOPTED.[43]

32. IT IS FURTHER ORDERED, That all Tier I carriers with jurisdictional shifts in total study area unseparated revenue requirements of 5 percent or greater SHALL FILE reports as specified in Appendices A, B, and C within 30 days of release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

(CONF.WK1) Approved by OMB

VER:06/02/89 CONFORMANCE REPORT 3060-0391

DATA REQUEST Expires 9/30/90

Est. Avg. Burden Hrs. Per Response: 120 Hours

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HOLDING COMPANY _____

OPERATING COMPANY _____

STATE OF OPERATIONS _____

STUDY AREA NECA CODE _____

MAILING ADDRESS _____

_____

_____

_____

CONTACT PERSON _____

TELEPHONE NUMBER _____

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FILE RENAMING INSTRUCTIONS

TO INSURE ACCURACY IN SUMMATION OF THE DATA, PLEASE CHANGE THE CURRENT FILE NAME (CONF.WK1) TO AN EIGHT (8) CHARACTER FILE NAME WHERE THE FIRST TWO CHARACTERS ARE THE INITIALS FOR THE COMPANY NAME, THE SECOND TWO CHARACTERS ARE THE INITIALS FOR THE STUDY AREA, AND THE REMAINING FOUR CHARACTERS ARE "CONF". THEREFORE, AN EXAMPLE FILE NAME FOR BELL ATLANTIC'S PENNSYLVANIA STUDY AREA WILL BE "BAPACONF.WK1". PLEASE CREATE A DIFFERENT LOTUS WORKSHEET FILE FOR EACH STUDY AREA.

INPUT OF DATA:

THE INPUT CELLS ARE UNPROTECTED CELLS WHICH CONTAIN AN ENTRY LINE, "_____". CELLS WHICH CONTAIN A "0" ARE SUMMATION FORMULAS OR CALCULATIONS AND ARE PROTECTED.

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DO NOT MAKE ANY OTHER CHANGES IN THE WORKSHEET.

DO NOT INSERT OR DELETE COLUMNS OR ROWS!!!!!!!

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8772

FCC 89-336 Federal Communications Commission Record 4 FCC Rcd No. 26

DO NOT MAKE ANY OTHER CHANGES IN THE WORKSHEET.
DO NOT INSERT OR DELETE COLUMNS OR ROWS!!!!!!!

(CONF.WK1)
VER:06/02/89

CONFORMANCE REPORT
DATA REQUEST

APPROVED BY OMB
3060-0391
EXPIRES 9/30/90
Est. Avg. Burden Hrs. Per Response: 120 hours

HOLDING COMPANY _____
OPERATING COMPANY _____
STATE _____
NECA CODE _____

CONFORMANCE REPORT
(MEASURING THE JURISDICTIONAL SHIFT CAUSED BY THE CONFORMANCE OF PART 36 SEPARATIONS MANUAL)
($000's)

	1987 PART 67			1988 PART 36		NON CONFORMANCE ITEMS	1988 LESS NON CONFORMANCE ITEMS		IMPACT OF CONFORMANCE CHANGES
	SUBJECT TO SEPARATIONS (A)	IS (B)	IS (C=B/A)	SUBJECT TO SEPARATIONS (D)	IS (E)	IS (F)	IS (G=E-F)	IS (H=G/D)	IS (I=H-C)
GROSS INVESTMENT BASE	_____	_____	N/A	_____	_____	_____	0	N/A	N/A
RESERVE	_____	_____	N/A	_____	_____	_____	0	N/A	N/A
NET INVESTMENT BASE	0	0	N/A	0	0	_____	0	N/A	N/A
FED. INCOME TAXES	_____	_____	N/A	_____	_____	_____	0	N/A	N/A
EXPENSES & OTHER TAXES	_____	_____	N/A	_____	_____	_____	0	N/A	N/A
REVENUE REQUIREMENTS	_____	_____	0.00%	_____	_____	_____	0	0.00%	0.00%

IS = INTERSTATE

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APPENDIX B

Guidelines for Monitoring Jurisdictional Shifts

I. General Guidelines

1. Separate forms must be completed for each study area.

2. One month or any combination of months that are representative of annualized data may be used to develop the data for 1987 and 1988.

3. In developing revenue requirements, carriers must use the authorized interstate rate of return and tax rates in effect for the period studied.

4. Cost and revenues related to the Part 64 cost allocation manuals, as well as other revenues and costs associated with services not subject to separations, must be excluded from this analysis.

NOTICE : The Jurisdictional Revenue Requirement Monitoring Report is needed to provide this Commission with the data necessary to fulfill our regulatory responsibilities with respect to interstate telephone service under Title II of the Communications Act of 1934, as amended. This Report collects the revenue requirement results of the jurisdictional separations procedures as specified in the former Part 67 and Part 36 of this Commission's Rules. The Report specifies information collection requirements in a consistent format and is essential for this Commission to monitor revenue requirements and jurisdictional separations results. Your response is mandatory.

Public reporting burden for this collection of information is estimated to average 120 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Federal Communications Commission, Office of Managing Director, Washington, DC 20554, and to the Office of Management and Budget, Office of Information and Regulatory Affairs, Washington, DC 20503. This Notice is required by the Privacy Act of 1974, P.L. 93-579, December 31, 1974, 5 U.S.C. §552(a)(e)(3) and the Paperwork Reduction Act of 1980, P.L. 96-511, December 11, 1980, 44 U.S.C. §3504.

II. Methodology

1. Col. A -- Using Parts 31 and 67 Rules and 1987 data, obtain the 1987 total amount subject to separations for investment and expenses.

2. Col. B -- Using Parts 31 and 67 Rules and 1987 data, obtain the 1987 interstate amount for investment and expenses.

3. Col. C -- Divide the interstate amount by the total amount subject to separations to obtain the 1987 interstate percentage.

4. Col. D -- Using Parts 32 and 36 Rules and 1988 data, obtain the 1988 total amount subject to separations for investment and expenses.

5. Col. E -- Using Parts 32 and 36 Rules and 1988 data, obtain the 1988 interstate amount for investment and expenses.

7. Col. F -- Calculate the impact of the changes unrelated to conformance and simplification including the Docket 80-286 changes noted in Section III and any new basic studies implemented in 1988. *See* infra Section III.

8. Col. G -- Subtract the items in Col. F from the 1988 interstate amount in Col. E.

9. Col. H -- Divide Col. G by the 1988 total amount subject to separations in Col. D to obtain the interstate percentage adjusted for items unrelated to conformance and simplification.

10. Col. I -- Subtract the 1987 interstate percentage in Col. C from the 1988 interstate percentage in Col. H adjusted for items unrelated to conformance and simplification.

III. Changes Excluded from Monitoring of Jurisdictional Shifts

A. *Investment Changes*

1. Collapse of Part 67 Categories 2 and 3 Central Office Equipment (COE) into Part 36 Category 2 (COE). For purposes of the comparison between 1987 and 1988, use the Part 67 composite 1987 factor for Categories 2 and 3 COE applied to 1988 Category 2 COE investment.

2. The first step in the transition of the apportionment of Category 3 COE (former Categories 4 through 7 COE) from the composite allocation factor to dial equipment minutes (DEM).

3. Changes in the categorization and apportionment of Category 4.23 COE (former Category 8.23 COE), All Other Interexchange Circuit Equipment

a. Recategorization based on end and intermediate terminations rather than circuit miles.

b. Apportionment of the Message Joint Subcategory based on Conversation Minutes (CM) rather than Conversation Minute Miles (CMM).

4. The third step in the transition from Subscriber Plant Factor (SPF) to the Gross (25 percent) Allocator.

5. The third step in the transition to the Universal Service Fund.

6. GAAP/capital to expense shift (investment portion).

7. The unamortized portion of inside wiring investment and associated loadings.

8. New Basic Studies.

If any new basic studies were introduced in 1988 that had a significant effect on the assignment of costs between the state and interstate jurisdictions, exclude this effect.

B. *Expense Changes*

1. Changes in the Part 36 treatment of Revenue Accounting Expenses.

a. For these purposes, do not include End User Access Charge Billing in Other Billing and Collection but, rather, treat it as a separate category.

b. Change in apportionment of Other Billing and Collection (new algorithm based on user counts with minimum factor of 5 percent and maximum factor of 33 percent).

2. Change in the tax rate.

In Column G, indicate the difference between the application of 1987 tax rates and 1988 tax rates to 1988 income.

3. AT&T takeback of billing and collecting functions (if applicable).

For purposes of the comparison between 1987 and 1988, use 1987 levels of AT&T takeback.

4. The amortized inside wire expenses.

5. Any other significant change between 1987 and 1988 that could affect the interstate assignment (*e. g.*, Depreciation Reserve Amortization). These changes must be noted in your response.

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FOOTNOTES

[1] MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, and Establishment of a Program to Monitor the Impact of Joint Board Decisions, CC Docket Nos. 78-72 and 80-286, 2 FCC Rcd 3298 (1987) (*Monitoring Recommended Decision and Order), adopted*, Establishment of a Program to Monitor the Impact of Joint Board Decisions, CC Docket No. 87-339, 2 FCC Rcd 5266 (1987) (*Monitoring Order), recon. granted in part*, Establishment of a Program to Monitor the Impact of Joint Board Decisions, CC Docket No. 87-339, FCC 88-244 (released July 19, 1988) (*Order on Reconsideration).*

[2] Amendment of Part 67 (New Part 36) of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72, 80-286 and 86- 297, 2 FCC Rcd 2582 (1987) (*Separations Recommended Decision and Order), adopted*, 2 FCC Rcd 2639 (1987) (*Separations Report and Order), recon. granted in part*, 2 FCC Rcd 5349 (1987), *recon. granted in part*, 3 FCC Rcd 5518 (1988).

[3] *Id.* at para. 26.

[4] The following parties filed comments: USTA, the BellSouth Telephone Companies, South Central Bell Telephone Company and Southern Bell Telephone and Telegraph Company (BellSouth), Pacific, Ameritech, SW Bell, MCI Telecommunications Corporation (MCI), the American Telephone and Telegraph Company (AT&T). The following parties filed reply comments: the Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company (US West), New York Telephone Company and New England Telephone and Telegraph Company (NYNEX), the Bell Atlantic Telephone Companies (Bell Atlantic), the GTE Service Corporation and its affiliated domestic telephone operating companies (GTOC), USTA, AT&T, MCI, SW Bell, BellSouth, Ameritech, and the Public Service Commission of the District of Columbia (DC). USTA filed *ex parte* filings on January 18, 1989 and June 15, 1989. The National Association of Regulatory Utility Commissioners (NARUC) filed an *ex parte* filing on June 15, 1989.

[5] Tier I carriers are carriers with $100 million or more in total company annual revenues. The initial classification of a company is determined by its lowest annual operating revenues for the five immediately preceding years. Subsequent changes in classification must be made when annual operating revenues show a greater or lesser classification for five consecutive years. Commission Requirements for Cost Support Material to be Filed with 1989 Annual Access Tariffs, 4 FCC Rcd 1662, 1663 and n.18 (1988).

[6] *Monitoring Order*. The monitoring program includes a series of periodic reports released by the Docket 80-286 Joint Board Staff of each year, beginning in 1987 and continuing through 1992. These reports include eight categories of issues: (1) subscribership and penetration levels; (2) lifeline assistance plans, including the subscriber line charge waiver and Link-Up programs; (3) costs and high cost assistance; (4) network usage and growth; (5) rates and revenues: (6) bypass; (7) pooling and rate deaveraging; and (8) jurisdictional shifts in revenue requirements. We recently adopted the Docket 80-286 Joint Board's recommendation that we reduce the frequency of these monitoring reports to a semi-annual basis. *See* Establishment of a Program to Monitor the Impact of Joint Board Decisions, CC Docket No. 87-339, FCC 89-223, released June 30, 1989.

[7] *Separations Report and Order*.

[8] Amendment of Part 67 (New Part 36) of the Commission's Rules and Establishment of a Federal-State Joint Board, CC Docket No. 86-297, 2 FCC 2582, 2584 (1987) (*Separations Recommended Decision and Order).*

[9] *Id.* at 2586.

[10] 2 FCC Rcd at 3301-02.

[11] *Id.* at 3302.

[12] *Id.* at 3302.

[13] *Id.* at n. 34.

[14] *Order on Reconsideration*, at paras. 26 - 27.

[15] Establishment of a Program to Monitor the Impact of Joint Board Decisions, CC Docket No. 87-339, DA 89-102, released January 31, 1989.

[16] Establishment of a Program to Monitor the Impact of Joint Board Decisions, CC Docket No. 87-339, DA 89-376, released April 13, 1989.

[17] *See* Reply of AT&T at 7, n.*.

[18] *See* Comments of USTA at 3, n.7.

[19] Although SW Bell presents alternative modeling approaches, it supports USTA's approach. *See* Comments of SW Bell at 4, n. 9.

[20] *See* Comments of AT&T at 5, n.*.

[21] *Id.* at 5, n.**, and Attachment 1.

[22] *See id.* at 6, n.**.

[23] *See* Reply of AT&T at 6, n.*.

[24] *See* Comments of AT&T at 6.

[25] *See* Reply of Ameritech at 5, n. 14.

[26] *See* Reply of AT&T at 2, n. *.

[27] *See* Comments of AT&T at 5, n.*.

[28] *See* Reply of AT&T at 5.

[29] All parties agree except DC which did not comment on this issue.

[30] *See* Reply of SW Bell at 6.

[31] *See* Reply of DC at 3 and Attachment A.

[32] For example, DC states, if a carrier's interstate allocation is 31 percent in 1987 and it is 28 percent in 1988, the resulting revenue requirement shift can be measured in two ways, each having a different impact on the 5 percent threshold. DC states that, if viewed as a percentage point change, the revenue requirement shift would be approximately a 3 percent decrease in interstate revenue requirements (31 percent minus 28 percent), but if it is viewed as a percentage change, the revenue requirement impact would be approximately 10 percent (3 percent divided by 31 percent).

[33] National Association of Regulatory Utility Commissioners, Resolution on Jurisdictional Revenue Effect Measurement, adopted March 1, 1989, Washington, D. C.

[34] We derived this percentage from an analysis of the National Exchange Carriers Association's common line pool data and from 1989 Tariff Review Plan data.

[35] AT&T argues that our report should include the effect of any changes in the reporting carriers' operations, growth or level of expenses. We recognize that many factors, some of which are often in a state of flux, can have an impact on revenue requirements. We do not believe at this time, however, that the effort necessary to isolate these factors is warranted because, in our experience, they are not likely to cause significant changes in the division of requirements between the jurisdictions.

[36] 2 FCC Rcd at 3302 (emphasis added).

[37] *See Separations Recommended Decision and Order*, 2 FCC Rcd at 2584-87.

[38] Because we may require additional data if necessary, we require that carriers maintain the support materials used in calculating their reports and that they be prepared to make such materials available on request.

[39] Thus, for example, if a Tier I carrier's 1987 study area interstate allocation was 23 percent of total unseparated revenue requirements and its 1988 interstate allocation was 27 percent of the total unseparated revenue requirements, that carrier should not file a report. If, however, that carrier's 1987 interstate allocation was 23 percent and its 1988 interstate allocation was 28 percent, it must file a report. Other carriers may report on an optional basis if they meet the 5 percent threshold.

[40] *Order on Reconsideration*, at para. 29.

[41] *Id.*

[42] DC also requests that, if we allow carriers to use annualized data for the 1989 report, we should require the use of actual calendar year data for the 1990 report. We will consider the need for such a requirement after reviewing the reports filed in 1989.

[43] This action is taken pursuant to 47 U.S.C. §§154(i) and (j), 201, 202, 203, 403, and 410.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 89-611

In the Matter of

NATIONAL EXCHANGE CARRIER ASSOCIATION, INC.
Tariff F.C.C. No. 5 Transmittal No. 364

Traffic Sensitive Switched Access Rate Adjustment

ORDER DESIGNATING ISSUES FOR INVESTIGATION

Adopted: December 19, 1989; Released: December 26, 1989

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On September 12, 1989, the Common Carrier Bureau instituted an investigation into the lawfulness of the traffic sensitive (TS) switched access rates set forth by the National Exchange Carrier Association, Inc. (NECA) in Transmittal No. 364.[1] That transmittal increased the NECA TS switched access rates 7.3 percent.[2] Transmittal 364 became effective September 13, 1989. The *Investigation Order* suspended these rates for one day and ordered NECA to keep accurate account of all associated earnings, costs, and returns. On October 12, 1989, MCI Communications Corporation (MCI) filed a petition for reconsideration or clarification of the *Investigation Order*. NECA filed an opposition on October 23, 1989. By this Order, we designate the specific issues to be examined in this investigation.

II. BACKGROUND

2. NECA claimed it was necessary to retarget these rates in order to offset an unexpected increase in its TS switched access revenue requirement. NECA attributed the increase in its revenue requirement to changes in the Commission's accounting and separations rules which became effective January 1, 1988. NECA argued that the rates it submitted as part of the 1989 access tariff filings were based on cost studies which did not fully reflect the effect of these rule changes. NECA claimed that actual data incorporating the rule changes indicated an erosion of its earnings well below the authorized 12 percent rate of return. NECA also explained that its members' revisions to monthly pool settlement data already on file typically had the effect of increasing the TS revenue requirement and, as a result, lowering the pool's rate of return. NECA also predicted that the settlements paid to its average schedule member companies would be $10.1 million higher than the amount projected in NECA's annual filing.

3. While finding the claim of earnings erosion plausible, the *Investigation Order* observed that NECA had failed to provide sufficient evidence to justify the proposed 7.3 percent rate increase.[3] We questioned whether the erosion in earnings would continue to the same extent. We noted that NECA had based its rate increase solely on projected results through the end of 1989, even though the rates will remain in effect through June 1990. That order also noted that NECA might reap a substantial windfall in the first half of 1990 if its TS earnings took an upward turn.[4] In light of these considerations, we instituted an investigation to determine whether NECA's increased TS switched access rates are just and reasonable, and imposed an accounting order to facilitate refunds should these rates prove unreasonably high. We stated, however, that we would designate the specific issues in this investigation, the information NECA is to submit, and relevant schedules in a subsequent Order.[5]

III. DESIGNATION OF ISSUES TO BE INVESTIGATED

4. The sole issue to be examined in this investigation is whether the TS switched access rates in NECA Transmittal 364 and subsequent transmittals for the period September 14, 1989, through June 30, 1990, are just and reasonable. In order to reach a determination on this matter, we direct NECA to submit the following information:

(1) For the period beginning September 14, 1989, and ending February, 28, 1990, NECA shall document on a month-by-month basis its TS switched earnings both as initially reported and as revised based on subsequent cost information submitted by its member carriers.

(2) For the period beginning January 1, 1987, and ending September 13, 1989, NECA shall document on a month-by-month basis any erosion in TS earnings it has experienced due to the discrepancy between its earnings as initially booked and as subsequently revised.

(3) Based upon this and any other data it wishes to submit, NECA shall compute projected earnings and rate of return for TS switched access rate elements for the period September 14, 1989, through June 30, 1990, showing in detail the calculations upon which this projection is based.

(4) To the extent these data indicate TS switched earnings above its authorized 12 percent rate of return for this period, NECA shall justify why refunds should not be required.

IV. MCI PETITION

5. MCI notes that the *Investigation Order* stated that the imposed accounting order "does not apply to NECA's member carriers." MCI Petition at 4. According to MCI, it is unclear whether this Bureau simply meant to make the administrative point that NECA must perform the accounting and record keeping functions required by the *Investigation Order* for its members, or whether the Bureau meant to excuse NECA members from any future refund obligations. If that statement was intended to excuse NECA members, MCI claims the statement contradicts the purpose of NECA and Section 217 of the

Communications Act, 47 U.S.C. § 217, which makes carriers and users responsible for the acts, omissions, or failures of their officers, employers, or agents. *Id.* at 5-6. In addition, MCI raises the question of whether NECA has the authority to make refund payments on behalf of its members. MCI notes, however, that the Commission could order NECA to make "refunds" by reducing its members' tariffed rates prospectively. In conclusion, MCI requests that we clarify that statement by either eliminating it from the Order or explaining how the Commission will be able to enforce any refund that may be required to protect access customers. *Id.* at 7-8.

6. In its response, NECA argues that clarification of the *Investigation Order* is unnecessary. Given NECA's role as administrative agent for member exchange carriers, NECA believes that the Bureau's statement obviously was meant to explain that the exchange carriers should not be required to keep individual account of overall monthly pool costs, revenues, and earnings. NECA Opposition at 1-2. According to NECA, there is nothing in the Order to suggest that we intended to exonerate exchange carriers from, or subject NECA itself to, potential refund liabilities. In NECA's view, the Order simply makes plain that accounting responsibilities do not apply to NECA members. *Id.* at 2.

7. As NECA indicates, the intent of the *Investigation Order* was to establish an administrative procedure to facilitate the computation of any refunds. The *Investigation Order* does not purport to absolve individual companies in the NECA pool of potential refund liability. Rather, directing NECA to keep account, for all its members, of any potential overearnings associated with pool activities will accomplish the goal of facilitating the computation of refunds in a manner consistent with Sections 204(a) and 217 of the Communications Act, 47 U.S.C. §§ 204(a), 217. Individual member companies are, of course, obliged to provide NECA with any information, including cost and revenue data associated with pool activities, NECA may require from individual companies to perform such an accounting.

V. PROCEDURAL REQUIREMENTS

8. This investigation will be conducted as a notice and comment proceeding to which the procedures set forth in this Order shall apply. We require NECA to submit a direct case addressing the issue outlined above no later than **May 15, 1990.** In its direct case, NECA must respond to each specific request. Moreover, the direct case must supply all information upon which NECA relies to support its position. Pleadings opposing the direct case must be filed no later than **June 5, 1990,** and must be captioned either "Opposition to Direct Case" or "Comments on Direct Case." NECA may file a "Rebuttal" to oppositions and comments no later than **June 19, 1990.**

9. An original and seven copies of all pleadings shall be filed with the Secretary of the Commission. In addition, one copy shall be delivered to the Commission's commercial firm for copying, International Transcription Service, Inc. (ITS), Room 246, 1919 M Street, N.W., Washington, D.C. 20554. Members of the general public who wish to express their views in an informal manner regarding Transmittal 364 may do so by submitting one copy of their comments to the Secretary, Federal Communications Commission, Washington, D.C. 20554.

10. *Ex parte* contacts (*i. e.*, written or oral communications which address either the procedural or substantive merits of the proceeding which are directed to any member, officer, or employee of the Commission who may reasonably to be expected to be involved in the decisional process in this proceeding) are permitted in this proceeding until a public notice of scheduled Commission consideration of a final Order is released and after the final Order itself is issued. Written *ex parte* contacts must be filed on the day submitted with the Secretary and Commission employees receiving each presentation. For other requirements, *see generally* Section 1.1200 *et seq.* of the Commission's Rules, 47 C.F.R. § 1.1200 *et seq.*

VI. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201- 205 and 403 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 201-205, 403, and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the issues set forth in Section III, *supra*, ARE DESIGNATED FOR INVESTIGATION.

12. IT IS FURTHER ORDERED that the petition for reconsideration or clarification filed by MCI Communications Corporation IS GRANTED to the extent provided herein and is otherwise DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] *See* National Exchange Carrier Association, Inc., 4 FCC Rcd 6972 (Com.Car.Bur. 1989) (*Investigation Order*).

[2] The prior NECA rates became effective as filed, without adjustment, on April 1, 1989. The rate increase set forth in Transmittal 364 affected only the local transport, local switching, and information surcharge rate elements.

[3] *Investigation Order*, 4 FCC Rcd at 6972.

[4] NECA and other local exchange carriers (LECs) have filed revisions to their access rates to implement rule changes scheduled to become effective on January 1, 1990. Those revisions, however, are not expected to alter the LECs' rates of return.

[5] *Investigation Order*, 4 FCC Rcd at 6972.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matters of

CLARK-BADER, INC., d/b/a/
TMC LONG DISTANCE,
Complainant,

v. File No. E-89-140

PACIFIC BELL TELEPHONE,
A PACIFIC TELESIS COMPANY,
Defendant.

and

ACTION TELCOM COMPANY,
Complainant,

v. File No. E-89-143

SOUTHWESTERN BELL TELEPHONE
COMPANY,
Defendant.

and

LITEL TELECOMMUNICATIONS
CORPORATION,
Complainant,

v. File Nos. E-89-147
through E-89-167

THE BELL TELEPHONE COMPANY OF
PENNSYLVANIA, et al.,
Defendants.

and

ADVANCED TELECOMMUNICATIONS
CORPORATION, et al.,
Complainants,

v. File Nos. E-89-278
through E-89-296

ILLINOIS BELL TELEPHONE
COMPANY, et al.,
Defendants.

ORDER

Adopted December 6, 1989; Released: December 26, 1989

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On November 14, 1989, the complainants in the above-captioned proceedings jointly moved for a continuance, citing the recent order of the Common Carrier Bureau (Bureau) that held in abeyance a set of proceedings that also involves Shared Network Facilities Agreements (SNFAs). *See MCI Telecommunications Corp. v. Bell Tel. Co. of Pa.*, DA 89-1449 (released Nov. 9, 1989) (MCI Order). The motion requests that the instant proceedings be held in abeyance pending the resolution of the Commission's related tariff investigation in CC Docket No. 85-166, which involves the same basic issues that underlie these complaints. *See Investigation of Special Access Tariffs of Local Exchange Carriers*, Memorandum Opinion and Order, CC Docket No. 85-166, Phase I, FCC 86-52 (released Jan. 24, 1986), *rev' d sub nom. MCI Telecommunications Corp. v. FCC*, 842 F.2d 1296 (D.C. Cir. 1988).

2. We now grant the complainants' motion and direct that the above-captioned proceedings be held in abeyance until such future date as will be determined by the Bureau. As stated in the MCI Order, we are cognizant that our present decision conflicts with an earlier Bureau determination that deferring action on SNFA complaints was precluded by the time constraints imposed by the Federal Communications Commission Authorization Act of 1988 (FCCAA), Pub. L. No. 100-594, 102 STAT. 3021 (Nov. 3, 1988). *See Illinois Bell Tel. Co., et al. v. AT&T, et al., 4* FCC Rcd 2690 (Com. Car. Bur. 1989). In the MCI Order, however, we re-interpreted the application of the FCCAA to those proceedings based on our conclusion that the time constraints imposed thereby did not mechanically apply in that set of cases. Consistent with the MCI Order, we also hold these proceedings in abeyance. We intend, as the complainants have requested, to resume action on these complaints immediately following resolution of the tariff investigation in CC Docket 85-166.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the above-captioned proceedings be held in abeyance pending further Commission action.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-598

In the Matter of

Amendment of Section 73.202(b), RM-7148
Table of Allotments,
FM Broadcast Stations.
(Lampasas and Franklin, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 7, 1989; Released: December 27, 1989

By the Chief, Allocations Branch:

1. Shamrock Communications, Inc. (petitioner), licensee of Station KLTD(FM), Channel 256C1, Lampasas, Texas, has filed a petition for rule making requesting the substitution of Channel 255C1 for Channel 256C1 at Lampasas, and modification of its license to specify the new channel. In order to accomplish the channel change, petitioner suggests the substitution of Channel 270A for vacant but applied for Channel 255A at Franklin, Texas.[1] Petitioner submitted information in support its proposal.

2. Petitioner states that Station KLTD(FM) is presently experiencing severe co-channel interference within its primary coverage contours from Station KODA(FM), Channel 256C at Houston, Texas, and Station KRYS(FM), Channel 256C1 at Corpus Christi, Texas. Petitioner further states that the interference is caused by the fact that the Houston and Corpus Christi stations are near the Gulf of Mexico, where "ducting propagation" conditions result in field strengths in excess of the normal. Petitioner claims that attempts to utilize an on-channel booster to resolve the interference problems has failed. Thus, petitioner seeks to change its channel from Channel 256C1 to Channel 255C1 to improve the quality of Station KLTD(FM)'s signal within its service area.

3. We believe the proposal warrants consideration. Channel 255C1 can be allotted to Lampasas at Station KLTD(FM)'s present transmitter site,[2] if Channel 270A is substituted for Channel 255A at Franklin. [3] Since Lampasas is located within 320 kilometers (199 miles) of the U.S.-Mexican border, the proposal requires concurrence by the Mexican government.

4. As requested, we shall propose to modify Station KLTD(FM)'s license to specify operation on Channel 255C1 in lieu of Channel 256C1 in accordance with Section 1.420(g) of the Commission's Rules. If the proposal is implemented the applicant at Franklin will be permitted to amend its application to conform with the requirements herein without loss of cut-off protection.

5. Accordingly, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Franklin, Texas	255A	270A
Lampasas, Texas	256C1	255C1

6. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Notice* to the following: Franklin Community Broadcasting, 839 Timber Cove, Seabrook, TX 77586.

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before **February 20, 1990,** and reply comments on or before **March 7, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Kenneth E. Satten, Esq.
Christine V. Simpson, Esq.
Wilkinson, Barker, Knauer & Quinn
1735 New York Avenue, N.W.
Washington, D. C. 20006
(Counsel for petitioner)

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Franklin Community Broadcasting is the sole applicant for Channel 255A at Franklin, Texas (BPH-890718MB). We shall serve a copy of this *Notice* on the applicant.

[2] The coordinates are 30-43-34 and 97-59-23.

[3] The coordinates for Channel 270A at Franklin, Texas, are 31-01-36 and 96-29-00. We note that the revised channel can also be used at the applicant's specified site at coordinates 31-02-58 and 96-26-06.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-589

In the Matter of

Amendment of Section 73.202(b), RM-7050
Table of Allotments,
FM Broadcast Stations.
(La Crosse, Wisconsin)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 1, 1989; Released: December 27, 1989

By the Chief, Allocations Branch:

1. The Commission has before it for consideration a petition for rule making filed by Vaughn Broadcasting Group (petitioner), licensee of Station WLXR-FM, Channel 285A, La Crosse, Wisconsin, requesting the substitution of Channel 292C3 for Channel 285A at La Crosse, and the concomitant modification of its license to specify operation on the higher class channel. Petitioner states its intention to apply for the channel, if allotted.

2. Channel 292C3 can be allotted to La Crosse in compliance with the Commission's minimum distance separation requirements with a site restriction of 1.3 kilometers (0.8 miles) southwest of the city.[1] We shall propose to modify the license of Station WLXR-FM, Channel 285A, as requested by the petitioner, to specify operation on Channel 292C3. However, in accordance with Section 1.420(g) of the Commission's Rules, should another party express an interest in the Class C3 allotment, the modification may not be implemented unless an additional equivalent channel is available at La Crosse.[2]

3. In view of the fact that La Crosse, Wisconsin, could receive an expanded FM channel, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
La Crosse, Wisconsin	227C, 239C2, 285A	227C, 239C2, 292C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **February 20, 1990,** and reply comments on or before **March 7, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Clifford M. Harrington, Esq.
Fisher, Wayland, Cooper & Leader
1255 23rd Street, N.W.
Suite 800
Washington, D.C. 20037
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The restricted site is the present transmitter site of Station WLXR-FM at La Crosse, at coordinates 43-47-30 and 91-15-25.

[2] Petitioner suggests the availability of Channel 266C3 at La Crosse to satisfy the interest of any other party wishing to apply for the non-adjacent channel requested for its upgrade. We find that Channel 266C3 is not available for consideration at La Crosse due to short spacings to pending proposals currently under consideration in MM Docket Nos. 89-298 [*See* 4 FCC Rcd 5288 (1989)] and 89-321 [*See* 4 FCC Rcd 5641 (1989)]. This petition was filed after the cut-off dates established in the aforementioned proceedings. In addition, Channel 266C3 at La Crosse would violate the Commission's separation requirements to Station WHLA(FM), Channel 212C, at La Crosse, Wisconsin.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-571

In the Matter of

Amendment of Section 73.202(b), RM-6460
Table of Allotments,
FM Broadcast Stations.
(Plainview, Texas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 7, 1989; Released: December 27, 1989

By the Chief, Allocations Branch:

1. Pursuant to the request of Adams-Shelton Communications[1] (petitioner), the Commission considers herein the *Notice of Proposed Rule Making*, 3 FCC Rcd 7272, proposing the substitution of Channel 280C1 for Channel 280A at Plainview, Texas, and the modification of Station KKYN-FM's license to specify operation on the higher class co-channel. Petitioner filed supporting comments restating its intention to apply for the channel.[2]

2. Channel 280C1 can be substituted for Channel 280A at Plainview, Texas, in compliance with the Commission's minimum distance separation requirements at Station KKYN-FM's current transmitter site. [3] We stated in the *Notice* that because of a short spacing to Station KKTC(FM), Channel 280A at Brownfield, Texas, final action herein would be contingent upon Station KKTC(FM) receiving a construction permit and being licensed on Channel 282C2. In *Brownfield, Texas*, 53 FR 43204, October 26, 1988, the FM Table of Allotments was amended to reflect Channel 282C2 at Brownfield, Texas, in lieu of Channel 280A, effective December 5, 1988. Brownfield Broadcasting Corp., licensee of Station KKTC(FM) at Brownfield, was ordered to submit a minor change application for a construction permit (Form 301) specifying the new facility within 90 days of that effective date. However, our records indicate that Station KKTC(FM) recently filed an application for construction permit to effectuate the upgrade at Brownfield.[4] Thus, we shall only protect Channel 282C2 at Brownfield at coordinates 33-11-39 and 102-13-23. Moreover, we shall proceed with rendering a final decision in this proceeding based on the allotment of Channel 282C2 in lieu of Channel 280A at Brownfield.[5]

3. Petitioner, in its further comments, contends that Station KKTC(FM) at Brownfield, Texas, has been off the air for over a year. Petitioner states that the Commission previously granted Station KKTC(FM) a special temporary authority to remain off the air until January 15, 1989. Furthermore, petitioner alleges that the station has continued to remain silent without authorization from the Commission since that time. Petitioner argues that the public interest is not served by delaying the KKYN-FM upgrade because KKTC(FM) is off the air. Petitioner suggests that a show cause order would be appropriate in order to provide Station KKTC(FM) with the option of resuming operation on a channel other than Channel 280.

4. Based on the information before us, we believe the public interest would benefit from the substitution of Channel 280C1 for Channel 280A at Plainview, since it could provide that community with expanded wide coverage area FM service. We find the issue raised by the petitioner concerning the "off the air" status of Station KKTC(FM) outside the scope of this rule making proceeding. Therefore, we shall forward the petitioner's comments to the Commission's Audio Services Division, FM Branch, to initiate action to address the matter. In the interim Station KKTC(FM) may continue or reestablish operation on its existing frequency until a construction permit is issued for the allotment of Channel 280C1 at Plainview. At that time, depending on the findings of the FM Branch, Station KKTC(FM) may either effectuate the upgrade in accordance with *Brownfield, Texas, supra*, or file an application to downgrade Channel 282C2 at Brownfield to Channel 282A.

5. As requested, we are herein modifying the license of Station KKYN-FM to specify operation on the higher class co-channel in accordance with Section 1.420(g).

6. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 12, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Plainview, Texas	247C1, 280C1, 295C2

7. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Plains Broadcasting for Station KKYN-FM, IS MODIFIED, to specify operation on Channel 280C1 in lieu of Channel 280A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

8. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

James D. Denison, General Manager
Brownfield Broadcasting Corp.
1002 East Cardwell Street
Brownfield, Texas 79316

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Subsequently, Michael and Mary Beth Fox, d/b/a Plains Broadcasting acquired the license of Station KKYN-FM at Plainview.

[2] Petitioner also filed further comments.

[3] The coordinates are 34-13-05 and 101-42-02.

[4] *See* BPH-891026IC.

[5] A copy of this *Order* will be served on the Brownfield licensee.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-335

In the Matter of

Amendment of Section 73.202(b), RM-6743
Table of Allotments,
FM Broadcast Stations.
(Cloquet, Minnesota)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 7, 1989; Released: December 27, 1989

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 5994 (1989), proposing the allotment of FM Channel 243A to Cloquet, Minnesota, as that community's second FM service. The *Notice* was issued in response to a petition filed by WKLK, Inc. (petitioner). Petitioner filed comments restating its interest in the allotment. No other comments were received.

2. Channel 243A can be allotted to Cloquet, Minnesota, consistent with the minimum distance separation requirements of Section 73.207 of the Commission's Rules.[1] Since Cloquet is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been obtained.

3. In view of the fact that Channel 243A can be allotted to Cloquet to provide the community with its second FM broadcast service, we find the allotment to be in the public interest. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 12, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Cloquet, Minnesota	243A, 263C1

4. The window period for filing applications will open on **February 13, 1990,** and close on **March 15, 1990.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 243A are 46-43-12 and 92-28-12.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-597

In the Matter of

Amendment of Section 73.202(b),	RM-7118
Table of Allotments,	
FM Broadcast Stations.	
(Wiggins, Mississippi)	

NOTICE OF PROPOSED RULE MAKING

Adopted: December 7, 1989; Released: December 27, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by John F. White (petitioner), requesting the substitution of FM Channel 250C2 for Channel 250A at Wiggins, Mississippi. Petitioner also requests modification of his construction permit (BPH-8609180B) for Channel 250A, to specify Channel 250C2.

2. We believe petitioner's proposal warrants consideration. Channel 250C2 can be allotted to Wiggins, Mississippi, in compliance with the minimum distance separation requirements of the Commission's Rules provided there is a site restriction 20.5 kilometers (12.7 miles) south of the community.[1] The site restriction will prevent a conflict with Station WTYL-FM, Channel 249A, Tylertown, Mississippi, and to the allotment site for vacant Channel 251A, Laurel, Mississippi, and to the construction permit for Channel 251A at Laurel. We shall also propose to modify the construction permit of John F. White to specify operation on Channel 250C2 in accordance with Section 1.420(g) of the Commission's Rules.

3. In order to provide a wide coverage area station for Wiggins, Mississippi, the Commission PROPOSES To Amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Wiggins, Mississippi	250A	250C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **February 20, 1990,** and reply comments on or before **March 7, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

David D. Oxenford
Lisa C. Wilson
Fisher, Wayland, Cooper & Leader
1255 23rd Street, N.W.
Suite 800
Washington, D.C. 20037

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 250C1 are 30-40-23 and 89-09-48.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-596

In the Matter of

Amendment of Section 73.202(b), RM-7144
Table of Allotments,
FM Broadcast Stations.
(Canton, South Dakota)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 7, 1989; Released: December 27, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Dallas M. Tarkenton (petitioner), requesting the substitution of Channel 274A for Channel 273A at Canton, South Dakota. Petitioner states that he has an application pending for Channel 273A at Canton, filed under the Commission's "first come-first serve" rules (ARN-890816MF). According to the petitioner, Channel 274A, unlike presently allotted Channel 273A, can be allotted to Canton, using either the reference coordinates specified for Channel 273A or the coordinates specified in his pending application, in compliance with the new spacing requirements needed for 6 kW operation. *See, Second Report and Order*, MM 88-375, 4 FCC Rcd 6375 (1989). Therefore, he requests that the channel substitution be made in order to permit the higher powered operation.

2. Channel 274A can be allotted to Canton in compliance with the Commission's minimum distance separation requirements and can be used at the site specified in petitioner's pending application.[1] Since no change in the class of station is proposed, and since the present channel allotment is mutually exclusive with the proposed channel allotment, petitioner will be permitted to amend his application without loss of cut-off protection if the channel substitution is adopted.

3. We believe the public interest would be served by proposing the substitution of Channel 274A for Channel 273A at Canton, South Dakota, since it could permit the station to operate with the higher Class A facilities. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Canton, South Dakota	273A	274A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **February 20, 1990,** and reply comments on or before **March 7, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Dallas M. Tarkenton
100 Wexford Place
Athens, Georgia 30606
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND

the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 43-17-05 and West Longitude 96-32-49.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 85-124

In the Matter of

Determination of Interstate
and Intrastate Usage of
Feature Group A and
Feature Group B Access Service

ERRATUM

Released: December 27, 1989

1. On December 5, 1989, this Commission released a Memorandum Opinion and Order in the above-captioned proceeding, FCC 89-316, that contained an error in paragraph 17. Paragraph 17 is corrected to read as follows:

> THEREFORE, IT IS ORDERED, that the recommendations contained in the Recommended Decision and Order of the Federal-State Joint Board released February 27, 1989, are ADOPTED, effective March 1, 1990.[1] To facilitate review of any necessary tariff changes, we direct carriers to file their revisions to be effective March 1, 1990, on at least 45 days' notice.

FEDERAL COMMUNICATIONS COMMISSION

FOOTNOTE

[1] This order is adopted pursuant to Sections 4(i), 4(j), 201, 202, 203, 205, 221, 403, and 410 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i)-(j), 201, 202, 203, 205, 221, 403 and 410 (1986).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Report No. DS-924 Released: December 27, 1989

COMMON CARRIER SERVICES INFORMATION

INFORMATIVE:

REQUEST FOR DECLARATORY RULING

General Electric Company (GE) has requested a declaratory ruling that the public interest would not be adversely affected by Michael A. Carpenter, a citizen of the United Kingdom, serving as an Executive Vice President and Director of two GE subsidiary corporations. GE is the parent company of GE American Communications, Inc., which holds various common carrier licenses.

Interested parties may file comments with respect to GE's request within 10 days of this Public Notice. Copies of GE's request are available for inspection in the Domestic Facilities Division (Common Carrier Bureau) Public Reference Room, Room 6220, 2025 M Street, N.W., Washington, D.C. This request is subject to further consideration and review and may be returned or dismissed if it is not found to be in accordance with the Commission's rules, regulations and other requirements.

For further information, contact Kathleen Campbell at (202) 634-1624.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN NETWORK, INC.

Petition for Declaratory Ruling
Concerning Backbilling of Access
Charges

ORDER ON RECONSIDERATION

Adopted: December 20, 1989; Released: December 27, 1989

By the Chief, Common Carrier Bureau:

I. BACKGROUND

1. On January 12, 1989, the Chief, Common Carrier Bureau, granted, in part, and otherwise denied, a petition for declaratory ruling concerning backbilling of access charges filed by American Network, Inc. (AmNet). American Network, Inc., 4 FCC Rcd 550 (Com. Car. Bur. 1989) (*AmNet Order*). Southwestern Bell Telephone Company (Southwestern) has filed a petition for reconsideration of that Order.[1] ITT Communications Services, Inc. (ITT), as successor to American Network, Inc., and the Competitive Telecommunications Association (CompTel) filed oppositions.[2] For the reasons given below, we deny Southwestern's petition.

2. The AmNet petition sought a Bureau ruling on a number of issues relating to the practice of backbilling for access charges by a number of local exchange carriers (LECs) and backbilling for the lease of facilities by interexchange carriers.[3] AmNet requested a ruling that carriers must render a bill within 60 days after service is provided. Several of the parties opposing the petition argued that backbilling is authorized by Section 415(a) of the Communications Act, 47 U.S.C. § 415(a).[4] According to these parties, this section permits carriers to bill customers for charges at any time during the two-year period following the date on which service was rendered. In response, AmNet claimed that billing requirements and the statute of limitations established in Section 415(a) are two separate and distinct matters. Moreover, it argued that Section 415 pertains to the collection of "lawful" charges and that backbilled charges are not lawful and therefore not covered by Section 415(a).

3. The Bureau declined to issue a declaratory ruling on AmNet's principal request, stating that the petitioner failed to provide sufficient information to enable the Bureau to resolve the controversy in a definitive manner. *Amnet Order*, 4 FCC Rcd at 551. However, the Bureau did comment on the dispute regarding the interpretation of Section 415(a) and its relationship to backbilling. The Bureau noted that "Section 415(a) establishes a time limit for filing a court action to recover unpaid bills; it does not establish a time limit for sending an initial bill to the customer for services rendered." *Id.* (footnote omitted). The Bureau then stated that "backbilling may under certain circumstances constitute an unjust and unreasonable practice in violation of Section 201(b) and that Section 415 does not authorize backbilling for any particular period." *Id.* at 552.

II. SUMMARY OF PLEADINGS

4. Southwestern requests that the Bureau reconsider the conclusions reached in the *AmNet Order* regarding the relationship between Section 415(a) and backbilling. Southwestern Petition at 2. Southwestern argues that Section 415(a) governs the time within which a carrier may backbill and, therefore, a carrier has two years from the time service is rendered to submit a bill to the customer. Southwestern also maintains that the statute of limitations contained in Section 16(3) of the Interstate Commerce Act (ICA), 49 U.S.C. § 16(3), is similar to the one contained in the Communications Act,[5] and that cases interpreting the ICA are therefore applicable to Section 415(a). Southwestern states that the Supreme Court determined in *Midstate Horticultural Co., Inc. v. Pennsylvania Railroad Co.*, 320 U.S. 356, 367 (1943) (*Midstate*) that the purpose of the ICA statute of limitations was to secure promptness in collections, not just to place a time limit on claims. *Id.* at 3.

5. Southwestern next argues that pursuant to Section 16(3) of the ICA, a carrier must charge only the rate contained in its tariff and refund any excess charges. Therefore, Southwestern maintains, a carrier is obligated to render a bill within two years. Otherwise, the carrier would violate its duty to collect or would give an undue preference to a customer by not charging (or collecting) the legal rate for shipping. *Id.* at 4. Southwestern concludes that pursuant to Section 415(a) of the Communications Act, a customer's liability for payment for service runs from the date a customer receives the service until two years thereafter. Thus, says Southwestern, "contrary to the Commission's [sic] finding, section 415 likewise gives a carrier the concomitant right to bill for that service within two years of the date the service is rendered." *Id.*

6. Comptel argues that Southwestern's reliance on *Midstate* is misplaced. According to CompTel, a statutory policy to enforce a carrier's obligation to collect charges without undue preference does not mean "*a fortiori* that the carrier may backbill such charges over an unreasonable period of time." CompTel Opposition at 3. Both ITT and Comptel reiterate the Bureau's statement that while Section 415(a) does not authorize backbilling, nonetheless backbilling may constitute an unjust and unreasonable practice pursuant to Section 201(b) of the Communications Act, 47 U.S.C. § 201(b). ITT Opposition at 2-3; CompTel Opposition at 2. ITT observes that in making such a determination, the Bureau stated that the circumstances pertinent to a particular delayed billing "may raise the public interest considerations of justness and reasonableness, wholly apart from the limitations standard of Section 415." ITT Opposition at 2. ITT states that the Bureau did not establish any standards or criteria which would render delayed billing unjust and unreasonable. Instead, ITT believes, the Bureau intended to await the filing of a complaint or a petition presenting a specific factual situation involving backbilling to establish standards for judging the lawfulness of this practice. *Id.* at 4.

III. DISCUSSION

7. Southwestern's argument that, pursuant to Section 415(a) of the Communications Act, a carrier has two years in which to bill a customer for service is not persuasive. *Midstate* does not support Southwestern's contention that Section 415 sets limitations on the time available to carriers to bill their customers for services rendered. Rather, the Bureau concludes, for the reasons discussed below, Section 415(a) merely establishes a time limit within which a carrier may initiate legal action to recover charges owed; it is not applicable to the question of billing.

8. By way of background, Section 415 originally contained a one-year statute of limitations governing the initiation of actions by carriers for recovery of their lawful charges and the initiation of actions by customers for recovery of overcharges. In 1974, Congress amended the section to extend from one to two years the period of limitations applicable to these actions. The legislative history of that amendment indicates that the reason Congress extended the time limit was to allow customers more time to scrutinize their bills in order to discover possible overcharges. In addition, Congress was concerned that the one-year limitation would prevent carriers from having to refund overcharges for services rendered more than one year prior to the discovery of the overcharge, "since the statute would appear not only to bar the remedy but also to destroy the liability," citing *Midstate*. S. Rep. No. 93-796, 93rd Cong., 2d Sess. 2 (1974). Congress stated that it wished to encourage refunds and that the extension of the statute of limitations "will serve this end." H.R. Report No. 93-1421, 93rd Cong., 2d Sess. 6311 (1974). There is no mention in either report that a carrier's bill may be rendered at any time during the two-year period.

9. As noted above, Southwestern cites the *Ward* decision in its analysis. While that opinion does state that the statute of limitations contained in the ICA is similar to that contained in the Communications Act, there is no indication that Section 16(3) of the ICA applies to backbilling. *See, e.g., A. J. Phillips Co. v. Grand Trunk Western Railway Co.*, 236 U.S. 662, 666 (1915)(the purpose of the statute of limitations was to prevent suits on stale claims; also, Congress was concerned with uniformity of treatment between carriers and shippers). Southwestern also relies on language in *Midstate*, that "[t]he paramount policy of §16 is to secure promptness in collections," as further support for the contention that Section 415 applies to backbilling. The court in *Midstate* did not elaborate on the subject of collections. *See Midstate*, 320 U.S. at 367. We believe that the term "collections" refers to the time between the rendering of a bill by the carrier and the tendering of payment by the customer. In contrast, backbilling applies to the time between the provision of service by the carrier and the rendering of the bill to the customer. Given this distinction, we find Southwestern's reliance on the language in *Midstate* to be meritless.

IV. CONCLUSION; ORDERING CLAUSE

10. In sum, the Bureau disagrees with Southwestern's position that the Communications Act affords carriers two years in which to bill a customer for service. We conclude that the statute of limitations in Section 415 governs the time between the accrual of a cause of action and the initiation of an action at law to collect charges or obtain a refund of overcharges. That section does not address what is an acceptable amount of time between a carrier's provision of service and the rendering of its bill. Instead, the reasonableness of the amount of time it takes a carrier to render a bill should be evaluated in accordance with the standards for what constitutes an unjust and unreasonable practice for purposes of Section 201(b) of the Act. Therefore, we deny Southwestern's petition for reconsideration of the *AmNet Order*.

11. Accordingly, IT IS ORDERED that the petition for reconsideration filed by Southwestern Bell Telephone Company IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Southwestern Bell Telephone Company Petition for Reconsideration, filed Feb. 13, 1989 (Southwestern Petition).

[2] ITT Communications Services, Inc., Opposition, filed Feb. 28, 1989 (ITT Opposition); Competitive Telecommunications Association, Opposition, filed Feb. 28, 1989.

[3] AmNet defined backbilling as billing for access services which were rendered more than 60 days prior to the bill date. AmNet Petition for Declaratory Ruling at 2 n.3.

[4] The 16 parties who filed oppositions are listed in the *AmNet Order*, 4 FCC Rcd at 552 n.13.

[5] Southwestern cites *Ward v. Northern Ohio Telephone Co.*, 251 F. Supp. 606, 608-11 (N.D. Ohio 1966) *(Ward)* as support for this position.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Request for Ruling by Press
Television Corporation Concerning
Applicability of Section 73.658(m)
of the Commission's Rules in the
Orlando-Daytona Beach-Melbourne-Cocoa
Television Market

MEMORANDUM OPINION AND ORDER

Adopted: December 5, 1989; Released: December 11, 1989

By the Commission:

1. Press Television Corporation, licensee of television station WKCF(TV), channel 68, Clermont, Florida has requested a ruling that WKCF(TV) is a station in the Orlando-Daytona Beach-Melbourne-Cocoa television market for purposes of Section 73.658(m) and may compete with stations in that market for exclusive rights to nonnetwork television programs.

2. Public notice of this request was given by the Commission on October 6, 1989 and responsive pleadings were filed by Meredith Corporation, licensee of station WOFL(TV), Orlando; H & C Communications, Inc., licensee of WESH(TV), Daytona Beach; WFTV, Inc., licensee of WFTV(TV), Orlando; Tele-Communications, Inc. and TCI Cablevision of Florida, Inc., operators of cable television systems in Daytona Beach, Titusville, Barefoot Bay, and Volusia County, Florida; National Cable Television Association; and Southern Broadcast Corporation of Sarasota.

BACKGROUND

3. Section 73.658(m), generally, permits a television station to buy exclusive rights in nonnetwork programming only against other television stations in the same market and against stations no more than 35 miles distant. The rule has as its intended purpose facilitating the acquisition of programming by stations in "overshadowed" markets. The rule states, in relevant part:

> (1) No television station shall enter into any contract, arrangement, or understanding, expressed or implied; with a non-network program producer, distributor, or supplier, or other person; which prevents or hinders another television station located in a community over 56.3 kilometers (35 miles) away ... from broadcasting any program purchased by the former station from such non-network program producer, distributor, supplier, or other person, except that a television station may secure exclusivity against a television station licensed to another designated community in a hyphenated market specified in the market listing as contained in Section 76.51 of this chapter, and for markets not listed in Section 76.51 of this chapter, the listing as contained in the ARB Television Market Analysis for the most recent year at the time that the exclusivity contract, arrangement or understanding is complete under practices of the industry. * * *
>
> * * * * *
>
> NOTE 2: It is intended that the top 100 major television markets listed in Section 76.51 of this chapter shall be used for the purposes of this rule and that the listing of the top 100 television markets appearing in the ARB *Television Market Analysis* shall not be used. The reference in this rule to the listing of markets in the *ARB Television Market Analysis* refers to hyphenated markets below the top-100 markets contained in the *ARB Television Market Analysis*. If a community is listed in a hyphenated market in Section 76.51 and is also listed in one of the markets in the ARB listing, the listing in Section 76.51 shall govern.
>
> * * * * *
>
> NOTE 4: New stations authorized in any community of a hyphenated market listed in Section 76.51 of this chapter or in any community of a hyphenated market listed in the *ARB Television Market Analysis* (for markets below the top-100 markets) are subject to the same rules as previously existing stations therein. New stations authorized in other communities are considered stations in separate markets unless and until Section 76.51 is amended by Commission action, or the ARB listing is changed.[1]

ARGUMENT

4. The question presented here is whether WKCF(TV) is a station in the Orlando-Daytona Beach-Melbourne-Cocoa television market that is listed as market 55 in Section 76.51 of the Rules. WKCF(TV) desires to be considered within the market and thus able to purchase exclusive rights for programming in that market vis-a-vis other market stations and makes both factual and legal arguments in support of the contention that it is a market station.

5. It first argues that the station's transmitter location, signal coverage area, and industry treatment all demonstrate that it is a competitor within the market. Clermont is a community approximately 25 miles to the *west* of Orlando in central Florida. The station's transmitter, however, is located in the vicinity of Orange City, some 30 miles to the *east* and north of Orlando. At this site, WKCF(TV) shares a common tower with WESH-TV, channel 2, which is licensed to Daytona Beach. WKCF(TV) places a grade B signal contour over substantially all of the ADI market identified by Arbitron as including stations licensed to Orlando, Daytona Beach, Melbourne, Cocoa, Leesburg, and Clermont. Parties selling programming to WKCF(TV), it is stated, have assumed that the station was seeking, and was entitled to, exclusivity throughout the market and understand their agreements to provide for such exclusivity.

6. As to matters of law, WKCF(TV) argues that Clermont is geographically within the market identified as Orlando-Daytona Beach-Melbourne, Cocoa in Section 76.51 of the rules because it is within 35 miles of Orlando. It argues that the proper interpretation of the rule is that:

> where a station in a non-designated community enjoys coverage substantially equivalent to stations in the designated communities, the station in the non-designated community is treated as 'local' for purposes of securing territorial exclusivity. *E.g., Robert R. Thomas, Jr.* [53 FCC 2d 395 (1975)]. Where there is no showing of comparability of coverage, a station will not be so treated. *E.g., Territorial Exclusivity in Non-Network Arrangements (Tampa-St. Petersburg)*, 59 FCC 2d 1058 (1976).

7. None of the parties responding to this request dispute the contention that WKCF(TV) is a competitive station in the market as a matter of fact. H & C Communications and WFTV, Inc., however, urge that if WKCF(TV) is able to secure non-network program exclusivity against WESH(TV) and WFTV(TV), they should reciprocally be permitted to secure exclusivity against WKCF(TV). Southern Broadcast Corporation of Sarasota urges that the relief requested be granted but on a waiver rather than a declaratory ruling basis. Meredith notes that in theory it does not oppose much of the substance of what is requested. It vigorously argues, however, that the proper procedure for accomplishing this result is the inclusion of Clermont as a designated community in the market at the conclusion of a Rule Making proceeding as has been done in the past with other similar requests. TCI also argues that Press's request ought to be treated as a petition for Rule Making and addressed in a notice and comment Rule Making proceeding. It notes that treating WKCF(TV) as a market station would entitle it to syndicated exclusivity and network program exclusivity protection against cable systems in Daytona Beach and other communities in the market. Both TCI and Meredith urge that no sufficient case for the urgent action requested has been made out. Reply comments filed by the National Cable Television Association make points similar to those of TCI and Meredith. NCTA also points out that the Pike and Fischer edition of the rules but not those in the Code of Federal Regulations contain a note to Section 73.658 stating that "[n]ew stations authorized in other communities are considered stations in separate markets unless and until Section 76.51 is amended by Commission action." Pike and Fischer, *Radio Regulation* at 53:1642 (FCC Rules: Current Service Three-Star Volume).

DISCUSSION

8. Section 73.658(m) cannot, in our view, be read to include within a major television market all stations licensed to communities that are within 35 miles of one of the named communities in the list of markets in Section 76.51 of the rules. However, we also recognize, given the structure of the Orlando-Daytona Beach-Melbourne-Cocoa market and the location of WKCF(TV) within it, that there can be little doubt that WKCF(TV) is in fact unavoidably competitive with other stations in the market and it would thus be anomalous to treat it as other than a market station for purposes of Section 73.658(m). Thus, while we must deny the declaratory ruling request, we believe a waiver should be granted.

9. With respect to the proper reading of the rule, the broad interpretation initially urged could include within major markets many stations of the "overshadowed" type that the rule was intended to assist by protecting them from program purchasing competition from larger market stations. Moreover, WKCF(TV)'s interpretation has previously been rejected. In *Territorial Exclusivity in Non-Network Arrangements (Tampa-St. Petersburg)*, 59 FCC 2d 1058 (1976), the Commission was called upon to consider whether a station in St. Petersburg, Florida could acquire exclusivity against a station in Sarasota, Florida. Notwithstanding the fact that the St. Petersburg station was licensed to the Tampa-St. Petersburg market and Sarasota was within 35 miles of Tampa, the Commission held that the rule precluded the acquisition of exclusivity. The requested interpretation in that case, that "if one station in a hyphenated market has a right to secure exclusivity against a station not located in the hyphenated market, then every station located in the hyphenated market may secure exclusivity against that station not located in the hyphenated market, and, vice versa," was rejected.

10. We do not read the earlier decision in *Robert R. Thomas, Jr.*, 53 FCC 2d 395 (1975) to be in conflict or require a different result. The issue involved there was whether a station licensed to Bluefield, West Virgina was permitted by the rule to acquire program exclusivity against a station some 50 miles distant in Oak Hill. The Commission looked at the facts involved and concluded, as WKCF(TV) would like us to do here, that both stations were in fact part of the same market and thus could acquire exclusivity against each other. The difference between the Oak Hill situation and that presented here is that Oak Hill and the station licensed to it were found to be part of the Beckley-Bluefield market. That market was not a "top 100" market listed in Section 76.51 of the rules so that, in accordance with Note 2 to Section 73.658(m), whether or not the two stations were in the same market was to be determined by industry practice, that is, "the listing of markets in the ARB *Television Market Analysis*."

11. Notwithstanding this conclusion, given the facts presented here, we believe WKCF(TV) should be considered within the Orlando-Daytona Beach-Melbourne-Cocoa market for purposes of Section 73.658(m). The rule in question was first proposed in 1968, in response to a request that the Commission take action to assure that excessive contractual exclusivity was not unreasonably depriving some stations, particularly including independent UHF stations, and the public served by them, of valuable programming. *Notice of Proposed Rule Making in Docket 18179*, 33 Fed. Reg. 7158 (1968). The rule as adopted, and as modified on reconsideration, clearly reflects the Commission's intention to permit stations serving the same market area with facilities competitive with each other to acquire exclusivity against each other. At the same time the rule was intended to assist new UHF independent stations to acquire programming. *First Report and Order in Docket 18179*, 42 FCC 2d 175 (1973), *reconsideration granted in part*, 46 FCC 2d 892 (1974). "The stations which the rule was intended to protect," as the Commission has stated, "are overshadowed stations, with a limited overlap and a limited capacity to compete with the larger station." *Ralph C. Wilson Industries, Inc.*, 91 FCC 2d

127,137-8 (1982). It would thus be entirely inconsistent with the intent and thrust of the rule to deny WKCF(TV) the relief requested.[2]

12. We agree with a number of the commenters herein, that this type of issue is ordinarily best addressed through a Rule Making process. We expressed this view in initially adopting the rule and have subsequently reiterated that we did not intend to follow "the concept of determining the applicability of the territorial exclusivity rule on a case-by-case basis." *Territorial Exclusivity in Non-network TV Programming* (*San Francisco-Oakland-San Jose*), 40 RR 2d 473 (1977). Further, we note that the issue of how the list of markets contained in Section 76.51 of the rules might be restructured is a matter within the scope of the pending *Further Notice of Proposed Rule Making in General Docket No. 87 - 24*, 3 FCC Rcd 6171 (1988). Nevertheless, we are persuaded that the anomalous nature of any decision to be bound by this rule in a way that would hinder the station's ability to compete, warrants a finding that the rule should be waived and that WKCF(TV) shall be considered a station local to and a part of the Orlando-Daytona Beach-Melbourne-Cocoa market for purposes of Section 73.658(m). This appears to be the very type of situation referenced in *WAIT Radio* v. FCC, 418 F. 2d 1153, 1157 (D.C. Cir. 1969), where the court stated that "[t]he agency's discretion to proceed in difficult areas through general rules is intimately tied to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances." Given the common tower site and market structure, the overall intended purposes of the rules (paragraph 11 *supra*), and the competitive difficulties which are exacerbated by an inflexible application of the rule, a waiver is appropriate here. [3] We do not intend to abandon the general policy of treating market structure issues through the Rule Making process. As previous market structure adjustment proceedings indicate, there may be considerable complexity and a balancing of conflicting concerns involved in these matters. *See e.g., Television Muscle Shoals*, 48 R.R. 2d 1191 (1980), *Recon. denied*, 87 FCCC 2d 507 (1981); *Melbourne, Florida*, 50 F.R. 2565 (1985). However, where there is a factual pattern as unambiguous as that here and the rule appears to be functioning in conflict with its intended purpose, we will not decline to act during the interim period until the matter is addressed in Docket 87-24.

Accordingly, IT IS ORDERED, That the request filed September 26, 1989, by Press Television Corporation is granted to the extent indicated herein and is otherwise denied.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The cited notes were inadvertently deleted by the Code of Federal Regulations following an unrelated amendment to Section 73.658(m) in the *Report and Order in Docket 87-24*, 3 FCC Rcd 5299 (1988). The missing language should be restored when the next edition of the C.F.R. is printed.

[2] We are confronted here with a station in a "smaller market" seeking to compete in the larger Orlando-Daytona Beach-Melbourne-Cocoa market. We are not faced with a large market station seeking to expand exclusivity into smaller fringe markets. WKCF(TV) will be able to purchase exclusivity only against stations licensed to designated communities in that market and within 35 miles of Clermont. This is not a situation where exclusivity will be extended over stations in smaller markets outside, but within 35 miles of, the named communities in the market. Such a situation could dictate a different result.

[3] Because the rule is intended to function in a reciprocal fashion, it necessarily follows that H & C Communications, Inc., WFTV, Inc., and other licensees of stations in the market may also obtain contractual exclusivity vis-a-vis WKCF(TV).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 18, 1989

COMMENTS INVITED ON NEBRASKA REGIONAL PUBLIC SAFETY PLAN

The Commission has received the public safety radio communications plan for the Nebraska area (Region 26).

In accordance with the Commission's Report and Order in General Docket 87-112 implementing the Public Safety National Plan, parties are hereby given thirty days from the date of Federal Register publication of this public notice to file comments and fifteen days to reply to any comments filed. (*See* Report and Order, General Docket 87-112, 3 FCC Rcd 905 (1987), at paragraph 54.)

In accordance with the Commission's Memorandum Opinion and Order in General Docket 87-112, Region 26 consists of the State of Nebraska. General Docket 87-112, 3 FCC Rcd 2113 (1988).

Comments should be clearly identified as submissions to *General Docket 89 - 608, Nebraska - Region* 26, and commenters should send an original and five copies to the Secretary, Federal Communications Commission, Washington, DC 20554.

Questions regarding this public notice may be directed to Maureen Cesaitis, Private Radio Bureau, (202) 632-6497, or Fred Thomas, Office of Engineering and Technology, (202) 653-8112.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-236

In re Applications of

Fenwick Island Broadcast Corporation & Leonard P. Berger d/b/a FENWICK ISLAND BROADCAST LIMITED PARTNERSHIP I	File No. BPH-850712ZD
FENWICK ISLAND COMMUNICATIONS, INC.	File No. BPH-850712ZE
GLORIA J. FERNANDEZ-PEREYO MERRYMAN	File No. BPH-850712ZI

For Construction Permit for a New
FM Broadcast Station on Channel 221A
at Fenwick Island, Delaware

MEMORANDUM OPINION AND ORDER

Adopted: December 15, 1989; Released: December 28, 1989

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. Oral argument was held on March 31, 1989, on the exceptions and briefs of the three remaining applicants in this comparative case, Fenwick Island Broadcast Limited Partnership I (Fenwick L.P.), Fenwick Island Communications, Inc. (FIC), and Gloria J. Fernandez-Pereyo Merryman (Merryman). Thereafter, the case was held in abeyance when the applicants indicated that a settlement was being negotiated. After several status reports, a Joint Request for Approval of Settlement Agreement was filed on September 29, 1989 by Fenwick L.P., FIC, Merryman, and a new party, Collins Broadcasting Systems, Inc. (Collins). The Mass Media Bureau filed Comments on October 12, 1989, raising two objections to the joint request, and responsive pleadings were filed on November 2, 1989. We will dismiss the joint agreement without prejudice to refiling for the three separate reasons set out below, paras 8, 11, 12.

2. *BACKGROUND* : Merryman was selected as the superior comparative applicant because of her 100% integration proposal in the Initial Decision of Administrative Law Judge John M. Frysiak. *Key Broadcasting Corp.*, 3 FCC Rcd 6587, 6600 (ALJ 1988). In response to a "real-party-in-interest" issue which had been designated against Fenwick L.P., the ALJ concluded that: "There is ample proof that Ms. Lyon and Dr. Saunders [two of the applicant's principals] are too beholden to Dr. Berger to be considered independent of his control. It must be concluded that Dr. Berger is the real-party-in-interest." *I. D.*, para. 147. In response to a Section 73.3518 inconsistent application issue, the ALJ concluded that a subsequently filed application for Ocean Pines, Maryland, but not the earlier filed Fenwick L.P. application, could potentially be "inconsistent" pursuant to Section 73.3518 of the Commission's Rules, and therefore he resolved that issue in "Fenwick L.P.'s favor." *Id.*, para. 148. With respect to the comparative issue, the ALJ held that "Fenwick L.P. must be eliminated or at best only is entitled to be credited with Ms. Lyon's [10.2%] participation." *Id.*, para. 158. FIC received credit for 40% fulltime and 60% part time integration. *Id.*, paras. 164-165. Ultimately, both Fenwick L.P. and FIC were eliminated from comparative consideration because of Merryman's decisive "clear quantitative difference." *Id.*, para. 173 (citing *New Continental Broadcasting Co.*, 88 FCC 2d 830, 850 (Rev. Bd. 1981)).

3. The Joint Settlement Agreement would first result in the dismissal of the Fenwick L.P. and FIC applications in return for the monetary consideration specified in paragraph 4 of the agreement. Second, the Merryman application, as amended, would be granted. The proposed amendment would substitute Collins as the surviving applicant. In addition to monetary consideration, Merryman would obtain a 10% voting interest in Collins, and be a Director of the corporation; William L. Collins, III, a new participant, would be a Director and obtain an 80% voting interest, and Michael T. Scanlon, Jr., another new principal, would be a Director and obtain a 10% voting interest.

4. The agreement, at paragraph 13, is also expressly conditioned on:

> . . . a recognition or ruling by the Review Board in its order approving this settlement, that nothing in the Administrative Law Judge's Initial Decision . . . adversely reflects either on the character qualifications or on the fitness to be a Commission licensee (as those terms are commonly used by the Commission), of Elijah Saunders, M.D., Sharon V. Lyon or Leonard P. Berger, M.D., who are present or former principals of Fenwick L.P.; and that the Administrative Law Judge's Findings of Fact and Conclusions of Law on the inconsistent applicant issue (47 C.F.R. §73.3518) are supported by the record evidence.

5. Finally, the agreement (at para. 18) recites that:

> Merryman hereby grants [Collins] a right of first negotiation with regard to the transmitter site specified by Merryman in the Application. Such first right to negotiate, however, does not impose upon Merryman any obligation to transfer, lease or otherwise make available the transmitter site to [Collins], except upon terms and conditions, including price, acceptable to Merryman.

6. *DISCUSSION:* In their joint request (at 3), the settling applicants maintain that the entry of new principals with 90% ownership interest in Collins and Merryman's

retention of a 10% interest in that entity "is consistent with the Commission's *Marco Island* policy." *See Rebecca Radio of Marco*, 4 FCC Rcd 830 (1989). The Bureau disagrees with this position, urging that the present settlement agreement "is manifestly inconsistent with" the *Marco* case, *supra*. We quote the Bureau's position (Comments at 3-4) on this important matter in its entirety:

> In *Marco*, the Commission approved a settlement which involved the grant of a construction permit to an entity which previously had not been a party to the proceeding. In taking such action, the Commission specifically noted that the hearing had not yet begun, and neither the applicants nor the Commission had invested substantial time or expense in resolving the proceeding. Consequently, the Commission determined that the settlement would not compromise the integrity of its adjudicatory processes. 4 FCC Rcd at [833] para. 23. By contrast, in the instant proceeding, the hearing has concluded, the Presiding Judge has released his Initial Decision, and the parties and the Commission clearly have expended substantial time and expense in resolving this proceeding. Thus, the instant settlement presents the exact situation which the Commission in *Marco* clearly indicated must be avoided.

7. The settling applicants reply that the Bureau's analysis relies on language which has been taken out of context. In paragraph 23 of *Marco*, upon which the Bureau relies, the Commission was discussing Section 73.3597(c)(2), the anti-trafficking rule which prohibits the assignment of a construction permit for an unbuilt station if any payment to the seller is in excess of its legitimate and prudent expenses. That prohibition is not applicable in this case, the applicants urge. In its general public interest discussion, they point out, the Commission observed that "the law generally favors settlements as a way of reducing the time, cost, and uncertainty of protracted litigation and that, similarly, the public benefits from "[a]voiding the delay associated with lengthy comparative hearings." *Marco*, 4 FCC Rcd at 832. The settling parties also argue that: "In taking [its] position, the Bureau ignores the fact that substantial resources are routinely expended in the prosecution of comparative proceedings beyond the hearing stage. In fact, the Commission, in *Marco* [at para. 17], recognized the potential for protracted delay and expenditures arising from 'the opportunity for administrative and judicial appeals.'" Joint Reply at 2; *see also* Fenwick L.P. Reply at 4-5.

8. We do not reach the policy dispute between the Bureau and the settling applicants about the scope of the Commission's decision in *Marco*, because our own review of the record has revealed a basic procedural defect which prevents us from approving the agreement. Here, as in *Marco*, joint petitioners seek a grant of an amended application which would substitute new substantial owners (here, 90% of the voting stock). In *Marco*, the Commission found that the parties had published local notice of the substitution of substantial new ownership on four different dates, and that the local notice also advised that the new owners had adopted the applicant's technical proposal. 4 FCC Rcd at 833. This need for a new public notice is mandated by Sections 309(d) and 311(a) of the Communications Act which provide for local public notice so that any party in interest may have no less than thirty days (following notice of any "substantial amendment" of an application) within which to file a petition to deny the application. *Cf. WFTL Broadcasting Co.* v. *FCC*, 376 F.2d 782 (D.C. Cir. 1967). Since Collins, unlike the new applicant in *Marco*, has not published local notice, there is a solid procedural bar to approval of the joint request. Moreover, the applicants are now on notice that the Bureau, which supported the settlement in *Marco*, has opposed extension of that decision to the present case. Such an extension would require resolution of a policy question which the Commission has not yet had the opportunity to address.

9. The Bureau's other objection is to the express conditions of the settlement agreement (paragraph 13) which would have the Board issue certain rulings favorable to Fenwick L.P. *See* para. 4 above. The Bureau reasons that as a result of the Commission's policy decision in *Allegan County Broadcasters, Inc.*, 83 FCC 2d 371 (1980), the Commission no longer requires a withdrawing applicant to establish its basic qualifications prior to the receipt of consideration for the dismissal of its application. "Since the Settlement Agreement is expressly conditioned upon para. 13 which requires a finding of basic fitness, and such finding is inconsistent under *Allegan*, the Bureau is compelled to interpose an objection to the Review Board's approval of the Settlement Agreement." Bureau Comments at 3. In their replies, the joint applicants assert that, contrary to the Bureau's position, *Allegan* is not a "bar" to resolution of the Fenwick L.P. questions. They also urge that "while *Allegan* does not *require* the resolution of character issues before a party may withdraw for consideration, it clearly does not *preclude* such resolution, if in fact such an issue was present in this case." Fenwick L.P. Reply at 3; *see also* Joint Reply at 3.

10. The Board does not deem it appropriate to grant the relief the joint applicants request even assuming *arguendo* that *Allegan* does not bar us from granting that relief. Our *Memorandum Opinion and Order*, in *Ocean Pines FM Partnership*, 4 FCC Rcd 3490, 3491 (Rev. Bd. 1989), recognized that the instant ALJ's findings regarding the real-party-in-interest and inconsistent application issues designated against Fenwick L.P. had a bearing on the *Ocean Pines* case. In *Ocean Pines*, 4 FCC Rcd at 3491, the Board noted that "[a]n initial decision is not a mere report to be arbitrarily disregarded . . . . In some cases, in fact, the doctrine of collateral estoppel spares the necessity of relitigating the same matter heard before. *See RKO General, Inc.*, 82 FCC 2d 291, 312 (1980).

11. An *Initial Decision*, 4 FCC Rcd 7767, was released by the Administrative Law Judge in *Ocean Pines*, on October 26, 1989, and exceptions were filed with the Board on November 27, 1989. In accordance with our *Ocean Pines Order*, *supra*, the ALJ presiding in that case did not relitigate the conduct of the Fenwick L.P.'s principals occurring in this proceeding. While existing precedent permits the Board to vacate the conclusions of law regarding the real-party-in-interest and inconsistent application issues, no precedent supports the specific relief sought here by the joint petitioners. Under well established Commission precedent, "conclusions that become moot while an appeal is pending may be vacated." *Seven Hills Television Co.*, FCC 89I-32, released May 1, 1989, at para. 16 (citing *A. S. D. Answer Service, Inc.*, 1 FCC Rcd 753, 755-756 (1986), *recon. denied*, 3 FCC Rcd 4213, 4214-4215 (1988)). Since the settlement agreement is conditioned upon the Board granting relief which is inconsis-

tent with past Commission practice, the Board cannot approve the agreement unless that condition is modified by the joint applicants.

12. A third obstacle to our approval of the settlement agreement arises from the fact that the newly-proposed permittee (Collins) does not even possess a transmitter site for the proposed facility. It is well-established that an applicant must have reasonable assurance of the availability of its proposed transmitter site when it files its application. *Radio Delaware, Inc.*, FCC 89R-78, adopted December 6, 1989; *Port Huron Family Radio Inc.*, 4 FCC Rcd 2532, 2534-35 (Rev. Bd. 1989); *62 Broadcasting*, Inc., 4 FCC Rcd 1768, 1773 (Rev. Bd. 1989); *Magdalene Gunden Partnership, 2 FCC Rcd* 5513, 5513-14 (Rev. Bd. 1987), *review denied*, 3 FCC Rcd 7186 (1988); *George Edward Gunter*, 104 FCC 2d 1363, 1364 (Rev. Bd. 1986); *Classic Vision, Inc., 104 FCC 2d 1271, 1273 (Rev. Bd. 1986), review denied*, 2 FCC Rcd 2376 (1987); *South Florida Broadcasting Co., Inc.*, 99 FCC 2d 840, 842 (Rev. Bd. 1984); *Dutchess Communications Corp.*, 101 FCC 2d 243 (Rev. Bd. 1985); Shoblom *Broadcasting, Inc.*, 93 FCC 2d 1027 (Rev. Bd. 1983), *rev. denied*, FCC 84-119, released April 2, 1984, *aff'd mem. sub nom. Royce International Broadcasting Co. v. FCC*, 762 F.2d 138 (D.C. Cir. 1985)(table), *cert. denied*, 474 U.S. 995 (1985). Here, the applicants' own statement (para. 5 above) indicates that there has been "no meeting of the minds" or "firm understanding" between Collins and Merryman. In fact, they recite that Merryman has only given Collins a "right of first negotiation," and that no *understanding whatsoever* has been reached concerning any "terms and conditions, including price, acceptable to Merryman." Thus, their own submission establishes that Collins has no transmitter site. Therefore, this matter must also be satisfactorily resolved by the joint applicants before their settlement agreement can be approved. We will not enlarge the issues at this point because Collins and Merryman can moot the matter by reaching "a firm understanding" rather than an inchoate "right of first negotiation."

13. ACCORDINGLY, IT IS ORDERED, that the Joint Request for Approval of Settlement Agreement filed September 29, 1989, IS DISMISSED without prejudice subject to the parties filing an acceptable settlement agreement within twenty (20) days of the release date of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-555

In re Application of

HAWTHORNE FM PARTNERSHIP (hereafter "Hawthorne") File No. BPH-881122MO

For Construction Permit
for a New FM Station on Channel 228A
in Hawthorne, Nevada

HEARING DESIGNATION ORDER

Adopted: November 16, 1989; Released: December 28, 1989

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned application of Hawthorne FM Partnership for a construction permit for a new FM station on Channel 228A in Hawthorne, Nevada.

2. *Unresolved Issues*. Information before the Commission indicates that Hawthorne was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.,
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Oliver Springs, Tennessee	88-201
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

Identical issues were specified in each of these proceedings: whether or not Sonrise was a real party in interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant has dismissed its application rather than resolving these issues. These unresolved issues call into question Hawthorne's qualification to be a Commission licensee. Therefore, such issues will be specified and resolved in this proceeding.

3. Item 5(e) of Section II, FCC Form 301 (October 1986) requires applicants to indicate if the applicant or any party to it has or has had an interest in "a broadcast application in any pending or concluded Commission proceeding which left unresolved character issues against the application." If answered in the affirmative, the applicant is to provide the name of the party having an interest, the nature of the interest or connection and dates, the call letters or file number of the application or docket number, and the location. Hawthorne has responded to Item 5(e) in the negative. However, Commission records indicate that Victoria P. Stuart ("Stuart") and Gary L. Simpson ("Simpson") were general partners in the Sonrise-affiliated applicant in the above Oliver Springs, Tennessee proceeding. Additionally, Simpson was a general partner in the Sonrise-affiliated applicant in the above Solona, Florida proceeding and a limited partner in the Sonrise-affiliated applicant in the above Rockledge, Florida proceeding. However, Hawthorne has failed to timely amend its application pursuant to 47 C.F.R. § 1.65 to notify the Commission of the outstanding character issues.[1] Accordingly, an appropriate issue will be specified below.

4. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the application IS DESIGNATED FOR HEARING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Sonrise Management Services, Inc. is an undisclosed party to the application of Hawthorne.

2. To determine whether Hawthorne's organizational structure is a sham.

3. To determine whether Hawthorne violated Section 1.65 of the Commission's Rules, and/or lacked candor, by failing to report the designation of character issues against other applicants in which one or more of its partners has an ownership interest and/or the dismissal of such ownership interest and/or the dismissal of such applications with unresolved character issues pending.

4. To determine, from the evidence adduced pursuant to Issues 1 through 3 above, whether Hawthorne possesses the basic qualifications to be a licensee of the facilities sought herein.

5. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

6. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicant and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

7. IT IS FURTHER ORDERED, That the applicant herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] The dismissed applications in question are as follows: File No. BPH-870107MJ, Oliver Springs, Tennessee dismissed July 29, 1988; File No. BPH-860827MG, Solona, Florida dismissed August 22, 1988 and File No. BPH-861105MD, Rockledge, Florida dismissed August 19, 1988.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 89-605

In the Matter of

Amendment of Parts 15 and 68 of the Commission's rules regarding cordless telephones — RM-6537

NOTICE OF PROPOSED RULE MAKING

Adopted: December 11, 1989; Released: December 29, 1989

By the Commission:

INTRODUCTION

1. By this action, the Commission proposes to amend its rules to require cordless telephones to be equipped with security provisions to protect the public switched telephone network from unintentional line seizure and telephone dialing.[1] The primary objective of the proposed requirement is to reduce harm to the "911" Emergency Services Telephone System. This action is being taken in response to a petition filed by the Personal Communications Section of the Telecommunications Industry Association (TIA).

BACKGROUND

2. A cordless telephone is a two-way low power communication system consisting of two parts. They are the "base" unit which connects to the public switched telephone network and the handset or "remote" unit. The base unit and the handset are connected by a radio link which is designed to eliminate the connecting handset cord of the standard telephone, thus allowing the user to move a considerable distance from the base unit while carrying on a telephone conversation. The radio frequency components of cordless telephones operate under the provisions of Part 15 of the Commission's rules. The base unit, as it interfaces with the public switched telephone network, operates under the provision of Part 68 of the Commission's rules.

3. The rules for cordless telephones were adopted by the Commission on December 22, 1983.[2] In the proceeding which led to the adoption of these rules, the issue of cordless telephone security was raised by one of the commenters. Cordless telephone security was referred to as "the ability of a cordless telephone to reject a dialing sequence from another user's cordless telephone or its immunity to spurious electrical signals generated in the vicinity of the cordless telephone." There was concern that a cordless telephone responding to these signals could initiate unintentional telephone dialing which could cause billing and other operational problems for telephone companies. It was believed that cordless telephones should be required to reject these unintentional signals.[3]

4. The Commission, in its *Report and Order* in Gen. Docket 83-325, stated that there was insufficient evidence to demonstrate that cordless telephones without security provisions would result in harm to telephone company central office equipment or lead to problems of misbilling to the extent that would warrant mandating a security requirement. The Commission noted, moreover, that market forces had already served to bring about some security features on cordless telephones. Rather than require specific security measures, the Commission proposed requiring a label on cordless telephones to inform consumers of the features incorporated to prevent unintentional dialing of calls caused by operation of other cordless telephones and interference from other sources of RF energy. Such a requirement was adopted on May 20, 1985.[4]

5. On September 1, 1988, TIA filed a petition requesting that the Commission consider rules requiring that cordless telephones provide increased protection to the network from unintentional line seizure and dialing, and protection to the user from unintentional ringing.[5] TIA recommended that this be achieved by requiring the use of a digital code word consisting of at least 256 code combinations or another method that would provide equivalent protection.[6] TIA requested that the rule state that where less than the full complement of 256 code combinations are made accessible to the user, or random and frequent automatic recoding is not provided by the manufacturer, means shall exist to, and the manufacturer must, vary any non-user programmable combinations on a frequent basis.

6. TIA believes that the proposed rules are necessary based on data collected in recent studies by itself, APCO and Bell Communications Research (Bellcore) indicating that cordless telephones not equipped with security coding circuitry are causing significant interference to many telephone company services, to customers with low telephone numbers, and to the "911" Emergency Services Telephone System.[7] TIA indicates that these problems typically occur when such telephones respond to random radio noise bursts and signals from other cordless telephones on the same channel and in turn generate random hook switch closures that are interpreted by the central office as dialing sequences.[8] It states that in certain instances, telephone line seizures have nearly overloaded some central offices equipment. TIA concludes that since this problem continues to persist, marketplace forces have not proven adequate to protect either the public switched telephone network or the consumer.

7. Twelve parties submitted comments in response to the TIA petition. A list of those filing comments is contained in Appendix A. All of the comments supported the request to provide telephone network protection by using a digital security circuit. However, not all the comments support the particular rule changes suggested in the TIA petition.

8. In the joint comments of the Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company, reference is made to studies performed within the past 3 years by the Bell operating companies in conjunction with Bellcore. These studies demonstrate that there is a growing problem of harm to the public switched telephone network being caused by cordless telephones which do not contain security provisions.

9. Southwestern Bell Corporation (Southwestern Bell) urges the Commission to adopt a regulation that specifies digital security coding requirements for cordless telephones. It argues that TIA's proposal to allow alternative security systems providing "equivalent protection" would result in the Commission spending significant resources in interpreting the regulation and policing the various security systems which may be chosen by the manufacturer. Southwestern Bell further requests that the Commission not only require digital security coding on cordless telephones, but also specify that each of the 256 individual security codes be repeated only once in any consecutively produced 256 cordless telephones. Otherwise, the very real possibility exists that numerous cordless telephones with the same security code will be produced one after the other, with the inevitable result that some customers located in the same geographic area will receive identical security codes. Southwestern Bell also states that a Bellcore study estimates that the annual costs incurred by telephone company maintenance centers alone in responding to complaints arising from non-coded cordless telephones without security provisions is $3,400,000. Southwestern Bell also believes that, if the Commission were to adopt the proposed rules, manufacturers of its cordless telephones would require a six month lead time to procure the materials and to make the required changes needed to implement the new requirements.

10. APCO agrees with TIA that the Commission should require digital coding of cordless telephones to prevent unintentional seizure of the telephone network, dialing, and ringing. APCO believes that such regulation is particularly necessary to prevent unintentional "911" calls. However, APCO would also like to see this regulation extended to cordless telephones already in the market or in use by consumers.

11. GTE Service Corporation (GTE) requests that the Commission seek comments on the minimum number of digital codes to be required. In addition, GTE questions whether the rules implementing the TIA request should be located in Part 15, Part 68, or both.

DISCUSSION

12. From the evidence presented in TIA's petition and the comments filed in response to that petition, it appears that instances of interference to the public switched telephone network from cordless telephones and unintentional ringing of cordless telephones are growing problems. Furthermore, there appears to be strong evidence that the public safety service access system provided through the "911" dialing number is being harmfully affected by cordless telephones which unintentionally dial this number. It also appears that the security coding of cordless telephones, which could provide an effective solution to these problems, is not being implemented at a satisfactory rate by manufacturers. There is no indication that the percentage of cordless telephones being marketed with security coding is increasing or that marketplace forces will eventually cause such features to become standard on cordless telephones. While most manufacturers do offer digital security coding on their more sophisticated cordless telephones, sixty percent of the latest applications for the Part 68 registration of such devices specify no form of digital security coding.

13. On the basis of this information, it appears that regulation is needed to protect the public switched telephone network from unintentional line seizure and dialing by cordless telephones and to ensure that cordless telephones do not ring unintentionally when in the presence of signals from other cordless phones or other interfering electrical or electromagnetic emissions. Digital security coding appears to offer a satisfactory means for achieving both of these objectives. Accordingly, we are proposing, as shown in Appendix B, to amend Parts 15 and 68 of the rules to require cordless telephones to include features to protect the public switched telephone network from unintentional line access and dialing. Specifically, we are proposing to require that cordless telephones incorporate circuitry which makes use of a digital code word in the dialing/ringing function to provided protection against unintentional access to the public switched network by the base unit and unintentional ringing by the handset. This rule would require that the dialing/ringing function operate such that each access of the telephone network or ringing of the handset is preceded by the transmission of a code word. Access to the telephone network would be permitted to occur only if the code word transmitted by the handset matches the code word set in the base unit. Similarly, ringing of the handset would be permitted to occur only if the code word transmitted by the base unit matches the code word set in the handset.

14. We also are proposing to require that there be a minimum number of possible digital codes incorporated in each phone to achieve the necessary level of protection. This is needed because the higher the number of possible codes, the less chance there is that any cordless telephones in close proximity to each other would have the same digital codes. We have chosen a minimum number of 256 possible codes since there is a consensus of opinion among both the petitioner and commenters that this number would provide adequate protection.[9] However, we invite comments as to whether a lesser number might also be adequate or whether a greater level is necessary and economically feasible.

15. To further reduce the likelihood of interference between cordless telephones equipped with security coding, it is desirable to ensure that channel and code combinations are distributed geographically such that it is not likely that two cordless telephones on the same channel with the same code will have overlapping ranges. We therefore are proposing to allow manufacturers to choose from among two plans for facilitating geographic separation of security code combinations:

1) Provide means for the user to readily select from among at least 256 possible discrete digital codes; or,

2) Provide a means for automatically selecting a different code from among at least 256 possible discrete digital codes.

The rules also would permit cordless telephones to provide for both user and automatic selection of codes provided that each of these modes enables selection from at least 256 possible discrete digital codes. We invite comments on the effectiveness of this approach as a means for minimizing incidences where two or more cordless telephones with overlapping ranges operate with the same combination of security code and channel. We intend to

consider alternative plans regarding this issue and invite interested parties to suggest other approaches and/or modifications to the plan we are proposing.

16. We are aware that one alternative to the above proposed plans would be to allow cordless telephones to incorporate a fixed digital code as long as the manufacturing process provided for varying the code among individual units to achieve at least 256 discrete codes. In addition, as raised in the comments, the manufacturing process for fixed code cordless telephones must contain provisions which will ensure geographic separation of security code combinations. Comments are invited on the provision for fixed digital codes, and we request specifics regarding manufacturing requirements for ensuring geographic separation of security code combinations.

17. We also invite comments and specific proposals regarding TIA's proposal that we allow manufacturers to use an alternative security method for cordless telephones that would provide protection equivalent to that offered by the method herein proposed. While we believe that such an approach is inherently desirable, we are concerned about the difficulties that would be encountered in making determinations of whether a given method would in fact provide equivalent protection and the level of Commission resources that would be involved in making such determinations.

18. In response to the comment which questioned whether security requirements for cordless telephones should be placed in Part 15 or Part 68 of our rules, we are proposing to amend both Parts 15 and 68. We believe that, although the issue of cordless telephone security is most closely related to the expressed purpose of Part 68,[10] the evidence submitted in this proceeding and in the previous proceeding in Docket 83-325 indicates that most security schemes will be implemented in the radio frequency link of the cordless telephone. Hence, circuits added to carry out the purpose of providing network protection could affect the cordless telephone's RF emission characteristics which are regulated under Part 15. Therefore, we feel it is appropriate to establish the technical requirements pertaining to the cordless telephone's ability to protect the public switched network from harm in Part 15. In addition, under Part 15 both the emission characteristics and network protection parameters of cordless telephones can be examined by the Commission through the certification process. Consequently, the requirement for all cordless telephones to contain provisions to protect the public switched telephone network from harm will be reflected in both Parts 15 and 68 of the rules.

19. We agree with the comments which stressed the importance of quick action in solving the operational problems with cordless telephones. However, we must also take into consideration the economic impact of these actions on the cordless telephone industry. Based on comments filed in this proceeding as to the length of time needed to design and manufacture new products which would comply with the proposed regulations, it is proposed that, within 60 days following the effective date of a final order in this proceeding, all cordless telephone applications submitted to the Commission for equipment authorization must demonstrate compliance with the proposed regulations. Within one year from the effective date, all cordless telephones manufactured or imported must comply with the regulations. Comments are requested as to the appropriateness of these dates.

PROCEDURAL MATTERS

20. *Initial Regulatory Flexibility Analysis*. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. section 603, the Commission's initial analysis is as follows:

I. Reason for actions: Cordless telephones without digital coding appear to be causing significant interference to many telephone company services. In some cases, phone line seizures have nearly closed down central offices and are causing significant unnecessary interference to many telephone company services, particularly to customers with low telephone numbers and to the "911" Emergency Services Telephone System.

II. Objective: The objective of the proposed rules is to reduce the amount of harm which is being caused by cordless telephones to the public switched telephone network and the "911" Emergency Services Telephone System.

III. Legal Basis: Action is proposed in accordance with Sections 4(i), 302, 303(e), 303(f) and 303(r) of the Communications Act of 1934, as amended.

IV. Description, potential impact and number of small entities affected: The proposed changes in the regulations would affect a number of entities both large and small. An estimate of the number of such parties affected is 50 or less. The cost to the manufacturers to comply with the proposed coding requirement is estimated to $3 - 6 per telephone, depending on the manufacturer.

V. Recording, record keeping and other compliance requirements: No changes in record keeping requirements are proposed. However, there may be an increase in the number of measurements performed on each cordless telephone in preparation for filing of an equipment authorization.

VI. Federal rules which overlap, duplicate or conflict with this rule: None.

VII. Any significant alternative minimizing impact on small entities and consistent with stated objectives: None.

21. Pursuant to applicable procedures set forth in Section 1.415 and 1.419 of the Commission's rules, interested parties may file comments on or before **March 13, 1990** and reply comments on or before **April 12, 1990.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

22. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the

Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first.' Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203.

23. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1202(b). Any person who makes or submits a written *ex parte* presentation shall provide on the same day it is submitted two copies of same under separate cover to the Commission's Secretary for inclusion in the public record. The presentation (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding(s) to which it relates and the fact that two copies of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation.

24. Any person who in making an oral *ex parte* presentation presents data or arguments not already reflected in that person's written comments, memoranda, or other previous filings in that proceeding shall provide on the day of the oral presentation an original and one copy of a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. The memorandum (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding and the fact that an original and one copy of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation. Section 1.1206.

25. *Paperwork Reduction Act Statement.* The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new or modified information collection requirement on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

26. Accordingly, IT IS PROPOSED THAT Parts 15 and 68 of the Commission's rules and regulations BE AMENDED as set forth in Appendix B below.

27. For further information on this proceeding contact George Harenberg, Room 7122A, Office of Engineering and Technology, Federal Communications Commission, Washington, D.C. 20554, (202) 653-7314.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Parties Filing Formal Comments on the TIA Petition

1. Dynascan Corporation; Cobra Electronics Group
2. Associated Public-Safety Communications Officers, Inc. (APCO)
3. United States Telephone Association
4. The Bell Atlantic Telephone Companies
5. The Southern New England Telephone Company
6. GTE Service Corporation
7. Ameritech Operating Companies
8. Cincinnati Bell Telephone Company
9. BellSouth Corporation and its Operating Telephone Companies, Southern Bell Telephone and Telegraph Company & South Central Bell Telephone Company
10. Joint Comments of The Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company & Pacific Northwest Bell Telephone Company
11. Joint Comments of Pacific Bell and Nevada Bell
12. Southwestern Bell Corporation

APPENDIX B

A. Title 47 of the Code of Federal Regulations, Part 15 is proposed to be amended to read as follows:

1. The authority citation for Part 15 continues to read as follows:

AUTHORITY: Sections 4, 302, 303, 304, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 302, 303, 304, and 307.

2. A new Section 15.214 is added, prior to the heading "Radiated Emission Limits, Additional Provisions", to read as follows:

Section 15.214 Cordless telephones.

Cordless telephones must incorporate circuitry which makes use of a digital code word in the dialing function to provide protection against unintentional access to the public switched network by the base unit and unintentional ringing by the handset. The dialing/ringing function shall operate such that each access of the telephone network or ringing of the handset is preceded by the transmission of a code word. Access to the telephone network is to occur only if the code word transmitted by the handset matches the code word set in the base unit. Similarly, ringing of the handset is to occur only if the code word transmitted by the base unit matches the code word set in the handset. This protection code system is to operate in accordance with the following provisions.

(a) There must be provision for at least 256 possible discrete digital codes.

(b) Manufacturers must use one of the following approaches for facilitating variation in the geographic distribution of individual security codes:

(1) Provide a means for the user to readily select from among at least 256 possible discrete digital codes.

(2) Provide a means for automatically selecting a different code from among at least 256 possible discrete digital codes.

(3) It is permissible to provide capability for both use and automatic selection of codes provided that each of these modes enables selection from at least 256 possible discrete digital codes.

(c) A statement of the means and procedures used to achieve the required protection shall be provided in any application for equipment authorization of a cordless telephone.

(d) The provisions of this section do not apply to cordless telephones manufactured or imported before (one year after effective date) and complying with all the provisions of Section 15.233.

B. Title 47 of the Code of Federal Regulations, Part 68 is proposed to be amended to read as follows:

1. The authority citation for Part 68 continues to read as follows:

AUTHORITY: Secs. 4, 201, 202, 203, 204, 205, 208, 215, 218, 313, 314, 403, 404, 410, 602, 48 Stat. as amended, 1066, 1070, 1071, 1072, 1073, 1076, 1077, 1087, 1094, 1098, 1102; 47 U.S.C. 154, 201, 202, 203, 204, 205, 208, 215, 218, 313, 403, 404, 410, 602, unless otherwise noted.

2. Section 68.200 is amended by adding a new paragraph (k), to read as follows:

Section 68.200 Application for equipment registration.

* * * * *

(k) Any application for registration of a cordless telephone operating under the provisions of Part 15 of this Chapter, shall be accompanied by a statement indicating that the device contains appropriate provision for protection of the public switched telephone network, pursuant to the requirements in Section 15.214.

FOOTNOTES

[1] Security provisions referred to in this proceeding are cordless telephone features that prevent unauthorized access of the telephone line, the dialing of calls in response to signals other than those from the owner's handset and the unintentional ringing of a cordless telephone's handset. These terms do not refer to the ability of someone else to listen in on a conversation.

[2] *See Report and Order* in Docket No. 83-325, 49 FR 1512, January 12, 1984.

[3] *See Report and Order* in Docket No. 83-325, *supra*, at para. 20.

[4] *See Second Report and Order* in Docket No. 83-325, 50 FR 24513 (1985). As adopted therein, Section 15.236 of the rules requires that a notice be placed on the package in which an individual cordless telephone is to be marketed informing the purchaser that the base units of some cordless telephones may respond to other nearby units or to radio noise, resulting in telephone calls being dialed through the base unit. In order to protect against such occurrences, the manufacturer further is required to inform the user with a statement that " . . . this cordless telephone is provided with the following features: (the manufacturer here lists features which will prevent the above)." 47 CFR Section 15.236.

[5] The TIA Petition for Rule Making was put on Public Notice October 7, 1988, with comments due November 10, 1988 and replies due November 25, 1988.

[6] Cordless telephone security is typically provided through the use of a specific digital code word. Whenever the user initiates a call, the transmitter first sends its digital code and then follows with the dialing signals. The receiver will only respond to signals preceded by the specific code, thereby preventing the unit from inadvertently initiating a connection to the public switched telephone network.

[7] TIA examined cordless telephone operation over a three month period. It concluded that some cordless telephones, in response to radio noise bursts, signals from other cordless telephones on the same frequency or other extraneous bursts of random interference, were generating a series of random hook switch closures that were being interpreted by the central office equipment as dialing sequences. APCO conducted a study over the last few years in which it requested selected public safety agencies to maintain records of unintentional calls to "911" and to ascertain the reasons for the calls. Data from this study indicated a pattern of false calls to "911" from cordless telephones. Bellcore conducted a study of customer trouble reports received by thirteen former Bell System operating companies. Data in this study was collected over a 30 day period from 21 maintenance centers, 6 business offices, and various other staff groups. Using the registration numbers required by the FCC for cordless telephones, Bellcore found that more than 67 percent of the customer trouble reports were associated with cordless telephones not equipped with digital security coding. The problems reported in these trouble calls included billing errors, requests for billing adjustments, no dial tone, receipt of a ring with no party on the telephone line, and receipt of telephone calls for other parties. Bellcore also reported that in those instances in which the simple act of replacing the non-coded telephone with a coded model, the problem disappeared.

[8] Low voltage in a cordless telephone's battery supply can cause spurious pulsing, sometimes to the point of actually dialing an unintentional call. In addition, nonsynchronous motors of the type found in many household appliances such as vacuum cleaners, electric knives, kitchen mixers, etc., can emit spurious radio frequency signals that fall within the bandwidth used by cordless telephone base stations.

[9] There are 256 possible combinations that can be formed from an 8-bit digital code word. Word length of 8 bits is common in digital devices and thus it would appear that an 8-bit code could be implemented simply and economically. With 256 possible security code combinations and the 10 cordless telephone channels, there would be 2560 possible channel and code combinations.

[10] Part 68 applies to all terminal equipment connected to the public switched telephone network and provides uniform standards for the protection of the network from harm caused by the connection of terminal equipment.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-88

In re Applications of

BEREA BROADCASTING CO., INC. File No. BPH-861125MA

MARY R. McGILL File No. BPH-861126MU

For Construction Permit for a
New FM Station, Channel 294A
Berea, Kentucky

MEMORANDUM OPINION AND ORDER

Adopted: December 19, 1989; Released: December 28, 1989

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. The Board has before it the *Initial Decision*, 4 FCC Rcd 2341 (1989) (" *I. D.* "), of Administrative Law Judge Joseph Chachkin (ALJ) granting the application of Mary R. McGill (McGill) for a Construction Permit to establish a new FM broadcast station at Berea, Kentucky, and denying the competing application of Berea Broadcasting Co., Inc. (Berea). The ALJ held that McGill prevailed because, on the standard comparative issue's "integration of ownership into management" factor, McGill's overall qualitative enhancements slightly exceeded those of Berea. After reviewing the *I. D.* in the light of exceptions filed by Berea, McGill's reply, the oral argument held September 15, 1989, and our own independent examination of the record, we find it necessary to remand the proceeding to determine whether McGill has reasonable assurance of the availability of a transmitter site.

BACKGROUND

2. On November 26, 1986, McGill filed its application and certified therein that it had obtained reasonable assurance of the availability of its proposed transmitter site from the site owner, Edward A. Wilmot. However, in February 1987, Wilmot sold the site to Mr. and Mrs. John Hurst. By late July or early August 1987, at the latest, McGill was aware of the sale, but did not contact the new site owners until shortly after release of the *Hearing Designation Order* (3 FCC Rcd 1454) in this proceeding on March 14, 1988. The Hursts refused to make the site available to McGill, and, on April 4, 1988, McGill filed a Section 1.65 Statement reporting the loss of its transmitter site.

3. Next, on May 19, 1988, McGill filed a Petition for Leave to Amend seeking to specify a new transmitter site, and claiming that it had "acted with due diligence in filing this amendment [because l]ess than two months have passed since [it] learned of the loss of [its] site." McGill did not state in its petition when the property was sold, nor did it submit a supporting affidavit of Mrs. McGill. On May 31, the Mass Media Bureau filed Comments supporting grant of the petition, submitting that "good cause exists for the acceptance of the . . . amendment [because] McGill could not have reasonably foreseen the need to amend her engineering proposal" and the amendment comports with Commission technical standards.

4. However, also on May 31, Berea opposed McGill's petition, stating that the property had been sold in February 1987, some fifteen months before McGill's amendment, and it urged that McGill lacked "good cause" for acceptance of the amendment. Berea's Opposition was supported by the sworn statement of its principal Robert Spradlin, who testified that he visited the new site owners on May 23, 1988 and was advised that (1) they purchased the property from Wilmot in February 1987, (2) they had not known that McGill had specified their property as a transmitter site until about two months earlier (in March 1988), when Mrs. McGill contacted them for the first time, and (3) they informed Mrs. McGill that the property would not be made available for use as a transmitter site, whereupon Mrs. McGill responded that "she did not plan on using the site anyway and had failed to contact them earlier because she had 'forgotten all about it.'" Spradlin also stated:

> That based upon information and belief the former property owner, Edward Wilmot has been and continues to be a business associate/partner of [Mrs. McGill's then-husband], that Edward Wilmot used the property in question as his principal residence up until the time it was sold and that, having sold the property, he relocated his residence [and] chang[ed] his residential telephone number.
>
> That based upon the foregoing it is my opinion that, given the close association of Mr. Wilmot and Mr. McGill and the fact that the sale of the property involved a relocation of Mr. Wilmot's principal residence and a change in his telephone number, it would have been impossible for Mr. McGill, husband of Mary McGill, not to have been aware that the property specified as a transmitter site in her application had been sold at the time it was sold in February, 1987.

5. On June 9, 1988, McGill filed a reply reasserting "good cause" for its amendment, and for the first time submitted a sworn statement of Mary McGill. She explained there that she "probably first realized that [Wilmot] had sold the property in late July or early August, 1987," that she did not realize that she had to report the sale of the site to the Commission within thirty days, that she was preoccupied beginning in January 1987 with her father's terminal illness (he died on May 29, 1987) and related family and business (flower shop) problems, and that "[o]nce there was activity on the FM again" (presumably, release of the *HDO)* she contacted the new owners and, when they denied her use of the site, promptly set about securing a new site, which resulted in the May 19, 1988 amendment. Also, she reaffirmed that

she had "fully intended to use the [original] site and talked to [the new owners] at great length trying to get them to change their mind."

6. On June 21, 1988, Berea filed a petition seeking a misrepresentation/lack of candor issue against McGill based on what it perceived to be inconsistencies in McGill's petition and reply. In an opposition filed July 6, McGill submitted another sworn statement of Mary McGill in an attempt to "clarify" her earlier statement. Therein, she admitted:

> *Although I knew sometime during the summer of 1987 that Mr. Wilmot had sold his property, I did not feel there was any problem with the site. I still felt I had reasonable assurance that I could use the site.* It was on top of a hillside not being used for anything. It was definitely not tillable nor could you run cattle on it. There was already an access road and I only needed to cut across the top of the hill. [Emphasis added.]

7. In a *Memorandum Opinion and Order*, FCC 88M-2440, released July 28, 1988, the ALJ granted McGill's Petition for Leave to Amend and denied Berea's Petition to Enlarge Issues. Pointing to McGill's personal problems, the ALJ held that McGill exercised due diligence and had "good cause" for her amendment, despite the more than eight month gap between its realization that the original site was sold and its acquisition of a replacement site. *Id.*, para. 3 (citing *Anax Broadcasting Inc.*, 87 FCC 2d 483, 489 (1981) ("due diligence . . . interpreted in light of the equities of the case")). The ALJ also held that Berea's allegations of misrepresentation were unsupported, finding unrefuted McGill's claim that "she learned of the unavailability of the site approximately two months prior to her amendment" and observing that "Berea has offered no evidence that McGill had reason to believe, at the time [she learned] of the sale of the site in August 1987, that the new owners would not make the site available to her." *Id.*, at para. 4.

DISCUSSION

8. It is black-letter Commission law that an applicant must have "reasonable assurance" of a transmitter site when it originally files its application, *Radio Delaware, Inc.*, FCC 89R-78, released December 20, 1989, para. 9 (and cases cited therein), and it must make ordinary efforts to assure that it maintains its site throughout the application process. *Alden Communications Corp.*, 2 FCC Rcd 3462, 3463 (Rev. Bd. 1987); *South Florida Broadcasting Co., Inc.*, 99 FCC 2d 840, 842 (Rev. Bd. 1984). Where an applicant seeks to amend its application to specify a new transmitter site because its original site is no longer available, it must first satisfy the Commission's stringent "good cause" test set forth in 47 CFR §73.3522(b). *California Broadcasting Corp.*, 90 FCC 2d 800 (1982); *Belo Broadcasting Corp.*, 68 FCC 2d 1313, 1320 (1978); *South Florida, supra; compare also Progressive Communications, Inc.*, 3 FCC Rcd 5758, 5758-60 (Rev. Bd. 1988) (rejecting site amendment lacking good cause) *with Elijah Broadcasting Corp.*, 3 FCC Rcd 5148, 5148-52 (Rev. Bd. 1988) (site amendment accepted). [1]

9. Here, it is undisputed that McGill knew by early August 1987, at the latest, that its proposed site had been sold, yet it made absolutely no effort to contact the new owners to request their permission to specify their site for at least seven months (until March 1988). Then, after its request was rejected, it filed an amendment proposing a new transmitter site in May 1988, after the total passage of more than nine months since it *first* learned of the sale. *Prima facie*, it appears that McGill was not diligent in filing its amendment. *See California Broadcasting Corp., supra*, 90 FCC 2d at 809 ("more than six months" wait to file curative site amendment is ordinarily not due diligence); *Magdalene Gunden Partnership*, 2 FCC Rcd 5513, 5514 (Rev. Bd. 1987) (eight-month delay not diligent); *Alden, supra*, 2 FCC Rcd at 3464 (1- year delay); *Shoblom Broadcasting, Inc.*, 93 FCC 2d 1027, 1029-30 (Rev. Bd. 1983) (20-month delay not diligent). McGill's various explanations that it "felt" that the original site would still be available despite the sale, that it amended within two months after the new owners denied its belated request for permission to specify the site, and that its personal exigencies should excuse its delay seem insufficient on the record facts to demonstrate due diligence. As we recently rehearsed:

> Although reasonable assurance may be acquired in numerous ways, it requires at minimum "a meeting of the minds resulting in some firm understanding as to the site's availability." *Genesee Communications, Inc.*, 3 FCC Rcd 3595 (Rev. Bd. 1988); *accord Progressive Communications, Inc.*, 104 FCC 2d 329, 331 (Rev. Bd. 1986) (remand on site issue) and 3 FCC Rcd 5758, 5758-60 (Rev. Bd. 1988) (Decision) (applicant disqualified). And, while some latitude is afforded such "reasonable assurance" (*e.g.*, the applicant need not necessarily own the proposed site, and may even work out the final details for lease/ownership at sometime in the future, *see National Innovative Programming Network, Inc.*, 2 FCC Rcd 5641 (1987)), the Commission's basic "reasonable assurance" standard remains unaltered. *Dutchess Communications Corp.*, 101 FCC 2d 243 (Rev. Bd. 1985); *Shoblom Broadcasting, Inc.*, 93 FCC 2d 1027 (Rev. Bd. 1983), *rev. denied*, FCC 84-119, released April 2, 1984, *aff'd mem. sub nom. Royce International Broadcasting Co. v. FCC*, 762 F.2d 138 (D.C. Cir. 1985) (table), *cert. denied*, 474 U.S. 995 (1985).

Radio Delaware, supra, at para. 9. An applicant must actively seek and procure such a "firm understanding," it can not "assume" that a new site owner will acquiesce in the previous owner's agreement to make the property available as a transmitter site, just as it can not "'assume' a competing optionee's site or a right of succession," *South Florida*, 99 FCC 2d at 848. And, the applicant must secure "[s]ome indication by the property owner that he is favorably disposed toward making an arrangement . . . . A mere possibility that the site will be available will not suffice." *William F. Wallace*, 49 FCC 2d 1424, 1427 (Rev. Bd. 1976). Therefore, McGill's alleged belief that the original site would remain available after its sale is no substitute for either "reasonable assurance" or "diligence." Thus, it is far from clear that it complied with the strict "good cause" test of 47 CFR §73.3522(b). If it did not, the acceptance of its amendment was improper and dismissal of its application should have resulted, irrespective of later claims to a qualifying site, *Shoblom Broadcasting*.

10. ACCORDINGLY, IT IS ORDERED, That the proceeding IS REMANDED to the Presiding Officer for the adduction of additional evidence and the preparation of a Supplemental Initial Decision on the following issue:

> To determine whether Mary R. McGill had reasonable assurance of its original transmitter site, to determine whether the loss of that site was unforeseeable, to determine whether McGill was reasonably diligent in filing its May 19, 1988 Petition for Leave to Amend, and to determine the effects thereof on the basic qualifications of Mary R. McGill to be a Commission licensee.

11. IT IS FURTHER ORDERED, That the burden of proceeding SHALL BE on Berea Broadcasting Co., Inc., and the burden of proof SHALL BE on Mary R. McGill.

12. IT IS FURTHER ORDERED, That the Motion to Reopen the Record and Enlarge Issues filed December 12, 1989 by Berea Broadcasting Co., Inc. IS REFERRED to the Presiding Officer. [2]

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] Section 73.3522(b) requires that post-hearing designation engineering amendments be supported by "good cause," including a special showing "that the amendment is necessitated by events which the applicant could not reasonably have foreseen." *California Broadcasting, supra,* 90 FCC 2d at 808. The time-honored six-point test of "good cause" requires an applicant to "demonstrate that it has acted with due diligence, that the amendment was not required by its voluntary act, that no additional issues or parties would be required, that the hearing process will not be disrupted, that there will be no prejudice to competing applicants, and that the applicant will not gain a comparative advantage." Id. *(citing Erwin O'Conner Broadcasting Co.,* 22 FCC 2d 140, 143 (Rev. Bd. 1970)).

[2] In this motion, Berea alleges that McGill may not be financially qualified because Berea National Bank, upon which McGill purportedly relies to fund its proposal, has sued the McGills to collect on a defaulted installment note of more than $49,000. A copy of the bank's Complaint (dated November 28, 1989) is attached to the motion. Also attached is a copy of Mrs. McGill's affidavit, filed June 17, 1988 in a divorce action, which alleged that she "produc[ed] insufficient income" to support herself or her children. While the Motion appears to raise *prima facie* a basic financial qualifications issue against McGill, the pleading cycle is not yet complete and, as a result, McGill has not yet had the opportunity to file an opposition. Because this proceeding must, in any event, be remanded on a site availability issue against McGill, the public interest in expeditiously resolving comparative cases will better be served by referring this matter to the ALJ than by awaiting completion of the pleading cycle.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-546

In re Applications of

SEGUE COMMUNICATIONS, INC. (hereafter Segue)	File No. BPH-871221MD
SUNNY COMMUNICATIONS, INC. (hereafter Sunny)	File No. BPH-871222MA
ANDREW J. GUEST d/b/a ALTAMAHA BROADCASTING (hereafter Altamaha)	File No. BPH-871223MO
INTERMART BROADCASTING GOLDEN ISLES, INC. (hereafter Intermart)	File No. BPH-871223MP
FRED GLADSTONE (hereafter Gladstone)	File No. BPH-871224MD
STEWART BROADCASTING, INC. (hereafter Stewart)	File No. BPH-871224MG
RESORT COMMUNICATIONS LIMITED PARTNERSHIP (hereafter Resort)	File No. BPH-871228MJ
MMC PARTNERSHIP (hereafter MMC)	File No. BPH-871228MK
DARIEN ASSOCIATES (hereafter Darien)	File No. BPH-871228MO

For Construction Permit
for a New FM Station on
Channel 299C2 (107.7 MHz)
in Darien, Georgia[1]

HEARING DESIGNATION ORDER

Adopted: November 13, 1989; Released: December 28, 1989

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Resort.* Information before the Commission indicates that Resort was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Oliver Springs, Tennessee	88-201
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Crawford, Georgia	88-294
Rocky Mount, North Carolina	88-299
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Beaumont, Texas	88-358
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433
Greenwood, Indiana	88-468
Harrison, Ohio	88-535

Identical issues were specified in each of these proceedings: whether or not Sonrise was a real party in interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant has dismissed its application rather than resolve these issues. These unresolved issues call into question Resort's qualification to be a Commission licensee. Therefore, such issues will be specified and tried against Resort in this proceeding.

3. The Commission's *Second Report and Order* in MM Docket No. 86-469, 3 FCC Rcd 4312 (1988) (" *SR & O* "), among other changes, allotted Channel 300C2 to WIJY-FM at Hilton Head Island, South Carolina. Five of the Darien, Georgia applicants (Altamaha, Intermart, Gladstone, Resort, and MMC) failed to specify sites which would protect the proposed use of Channel 300C2 at Hilton Head Island. The *SR & O* permitted these applicants to amend their applications to specify sites which are fully spaced to the Hilton Head allotment.

4. On September 26, 1988, Segue filed a petition to dismiss or deny the applications of Altamaha, Intermart, Gladstone, Stewart[2], Resort, and MMC alleging untimely filed amendments and/or noncompliance with the *SR & O*. However, in its reply to oppositions to petition to deny filed October 27, 1988, Segue withdrew its request to dismiss or deny the applications of all the above-named

applicants except Gladstone. Accordingly, the petition will be dismissed below as to the applications of Altamaha, Intermart, Stewart, Resort, and MMC.

5. Segue further argues, however, that Gladstone's application is still short-spaced with WIJY because his October 7, 1988 amendment changing his site is "grossly untimely" and that Gladstone has not shown good cause for the acceptance of the amendment. Therefore, Segue requests that Gladstone's amendment be rejected and his application be dismissed.

6. Pursuant to 47 C.F.R. § 1.65(a), each applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application or in Commission proceedings involving a pending application and the applicant shall as promptly as possible and in any event within 30 days, *unless good cause is shown*, amend or request the amendment of his application so as to furnish such additional or corrected information as may be appropriate. However, 47 C.F.R. § 73.3514(b) states that the FCC may upon its own motion or upon motion of any party to a proceeding, order an applicant to amend its application so as to make it more definite and certain. Consequently, in accordance with § 73.3514(b), the action the Commission took on its own motion in the *SR & O* requesting Gladstone and four other Darien, Georgia applicants to file amendments specifying new transmitter sites would be considered good cause for the acceptance of the amendment. Additionally, although the effective date of the *SR & O* was August 26, 1988, the *SR & O* did not specify a time frame in which Gladstone and the other applicants were to file their amendments. However, we believe that due diligence was exercised by Gladstone in trying to locate a new site. Therefore, we find no reason to reject Gladestone's amendment or to dismiss his application. Accordingly, Segue's petition to dismiss or deny as it applies to the applications of Altamaha, Stewart, Resort, and MMC will be dismissed and, as to the application of Gladstone, will be denied.

7. On December 28, 1987, in response to Section III of FCC Form 301, MMC indicated that it did not have sufficient net liquid assets on hand or available from committed sources to construct and operate the requested facility for three months without revenue. MMC stated that it was "obtaining financial data and [would] file an amendment to this section." This amendment has not yet been filed with the Commission. Accordingly, a financial qualifications issue will be specified below.

8. Section II, Item 4 of FCC Form 301 (October 1986) requires the listing of the applicant and, if other than a natural person, its officers, directors, stockholders and partners with attributable interests. MMC did not complete Item 4. MMC indicates it is a limited partnership. However, Item 4 shows only Mr. W. Keith Weekly, a non-voting limited partner, with 25% equity in the applicant. MMC did not list the general partner and indicate who owns the remaining 75% equity in the applicant. Accordingly, MMC will be required to file with the presiding Administrative Law Judge, within 30 days of the release of this Order, a new Section II, Item 4 detailing the complete ownership structure of the limited partnership.

9. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Segue, Sunny, Intermart, and Gladstone have not completed Item 4 correctly. Segue, Intermart, and Gladstone give a post office box number as the residence address for the applicant. Sunny's application does not list the applicant and the other required information pertaining to the applicant. Accordingly, Segue, Sunny, Intermart, and Gladstone must each submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days of the release of this Order.

10. *Segue*. Counsel for Segue has submitted a copy of the FAA's determination for its proposed tower structure. The coordinates specified for the transmitter site, however, do not agree with the coordinates specified in the instant application. The FAA's clearance lists the coordinates for the proposed tower structure as 31^0 16' *25* " North Latitude, 81^0 38' 57" West Longitude, while Section V-B of FCC Form 301 and the transmitter map show the coordinates as 31^0 16' *15* " North Latitude, 81^0 38^0 57" West Longitude. Consequently, Segue must file an explanation for this discrepancy within 30 days of the release of this Order. In addition, an air hazard issue will be specified below.

11. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicant below have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Intermart would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

12. The applicants below have petitioned for leave to amend their applications on the dates below. The accompanying amendments were filed after the last day for filing minor amendment as of right. Under 47 C.F.R. § 1.65 the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	DATE AMENDMENTS FILED
Segue	August 1, 1988; February 24, 1989; June 29, 1989
Intermart	March 25, 1988; April 18, 1988; May 18, 1988; July 15, 1988; September 26, 1988; November 17, 1988; February 1, 1989; March 21, 1989
Resort	May 9, 1989
Darien	May 31, 1989

13. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

14. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

15. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Sonrise Management Services, Inc. is an undisclosed party to the application of Resort.

2. To determine whether Resort's organizational structure is a sham.

3. To determine, from the evidence adduced pursuant to Issues 1 through 2 above, whether Resort possesses the basic qualifications to be a licensee of the facilities sought herein.

4. To determine whether MMC is financially qualified to be a Commission licensee.

5. To determine whether there is a reasonable possibility that the tower heights and locations proposed by Segue and Intermart would constitute a hazard to air navigation.

6. To determine which of the proposals would, on a comparative basis, best serve the public interest.

7. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

16. IT IS FURTHER ORDERED, That the September 26, 1988 petition to dismiss or deny as it applies to the applications of Altamaha, Intermart, Stewart, Resort, and MMC filed by Segue IS DISMISSED and, as to the application of Gladstone, IS DENIED.

17. IT IS FURTHER ORDERED, That the October 12, 1988 amendment filed by Stewart IS HEREBY RETURNED.

18. IT IS FURTHER ORDERED, That MMC shall submit an amendment in accordance with paragraph 8 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

19. IT IS FURTHER ORDERED, That Segue, Sunny, Intermart, and Gladstone shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days of the release of this Order.

20. IT IS FURTHER ORDERED, That Segue file a clarifying amendment, pursuant to paragraph 10 hereinabove, with the presiding Administrative Law Judge within 30 days of the release of this Order.

21. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

22. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Segue, Intermart, Resort, and Darien ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

23. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

24. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

25. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] Pursuant to *First Report and Order* in MM Docket No. 86-469, 2 FCC Rcd 6049 (1987), timely filed applications for the instant channel should have been filed during the period between November 24, 1987 and December 24, 1987. However, because of the Christmas holiday the President closed Federal offices early on December 24, 1987. As a result, the window closing date for this channel was extended to December 28, 1987, which was the next business day.

[2] Stewart was not one of the applicants permitted to amend its application pursuant to the *SR & O*. Further, the Commission data base indicates that its proposal is not short-spaced to the Hilton Head allotment. Accordingly, good cause has not been shown for the acceptance of its October 12, 1988 "Petition for Leave to Amend" and accompanying amendment filed specifically "to eliminate any possible short-spacing." Consequently, the amendment will be returned pursuant to 47 C.F.R. § 73.3522(a)(6).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-531

In the Matter of

SERAPHIM CORPORATION
Licensee of Station KGMC(TV)
Oklahoma City, Oklahoma

Order to Show Cause Why the
License for Station KGMC(TV)
Should Not Be Revoked

In re Application of File No. BTCCT-861216KH

SERAPHIM CORPORATION
Licensee of Station KGMC(TV)
Oklahoma City, Oklahoma

For Consent to the Transfer
of Control from Beverly Hills
Hotel Corporation to Seema S. Boesky

In re Application of File No. BTCCT-890519KF

OKLAHOMA CITY BROADCASTING
COMPANY, DEBTOR-IN-POSSESSION
Licensee of Station KGMC(TV)
Oklahoma City, Oklahoma

For Consent to the Transfer
of Control from Seema S.
Boesky to Ted F. Baze

MEMORANDUM OPINION AND ORDER

Adopted: December 20, 1989; Released: December 29, 1989

By the Commission:

1. Before the Commission are: (1) a Petition to Terminate Hearing and for Special Relief filed June 20, 1989 by Oklahoma City Broadcasting Company, Debtor-in-Possession (OCBC); (2) Mass Media Bureau's Comments in Support of Petition to Terminate Hearing and for Special Relief filed June 30, 1989; and (3) Reply to Mass Media Bureau's Comments in Support of Petition to Terminate Hearing and for Special Relief, filed July 25, 1989 by OCBC. The pleadings concern a proposal to conclude this revocation proceeding and transfer control of station KGMC(TV).

I. BACKGROUND

2. On December 3, 1987, the Commission ordered Seraphim Corporation (the predecessor in interest of OCBC) to show cause why the license of station KGMC(TV), channel 34, Oklahoma City, Oklahoma, should not be revoked. *Seraphim Corp.*, 2 FCC Rcd 7177 (1987). The Commission took this action in response to allegations concerning the control of Beverly Hills Hotel Corporation (BHHC), which owned an 85 percent interest in OCBC. (The remaining 15 percent of OCBC is owned by an individual, Ted F. Baze.)

3. According to these allegations, Seraphim failed to report, as required by Commission rules, that since April 8, 1981, Ivan F. Boesky controlled BHHC under a voting trust. (The other owners of BHHC are members of the Boesky family and of another, related family, the Slatkins.) It is alleged that Seraphim failed to disclose the existence of the voting trust: (1) in the application, filed September 8, 1983, by which BHHC acquired control of KGMC(TV), (2) in two ownership reports filed for KGMC(TV) on December 19, 1983, and (3) in two documents filed in connection with co-owned stations on May 30, 1984 and December 9, 1985. The trust was not disclosed until the filing, on December 16, 1986, of the above-captioned application for transfer of control of KGMC(TV) from BHHC to Seema S. Boesky.

4. The allegations also indicate that the principals of BHHC twice transferred control of KGMC(TV) without Commission approval, as required by 47 U.S.C. § 310(d). The first instance allegedly occurred on September 3, 1986, when Boesky was replaced by his wife, Seema S. Boesky, as voting trustee. The second occurred when the parties prematurely, on December 31, 1986, consummated the above-captioned application to transfer control of KGMC(TV) from BHHC to Seema S. Boesky by (1) merging Seraphim into OCBC, (2) distributing the OCBC stock held by BHHC to BHHC's individual stockholders, and (3) placing the OCBC shares in a voting trust of which Seema Boesky is the trustee. (A further entity, Beverly Hills Liquidating Partnership, was apparently then created to liquidate BHHC's nonbroadcast assets.)

5. Additionally, on April 23, 1987, Ivan Boesky pleaded guilty to making fraudulent statements to the Securities and Exchange Commission. The Commission sought to determine the impact of Boesky's conduct on Seraphim's character qualifications.

6. On January 12, 1988, OCBC notified the presiding judge that it desired to seek relief pursuant to the Commission's minority distress sale policy. *See Minority Ownership of Broadcasting Facilities*, 68 FCC 2d 979 (1978), clarified, 44 RR 2d 479 (1978). Under that policy, a licensee designated for a revocation or renewal hearing could, before the hearing began, sell its station to a minority-controlled buyer. (The policy was recently ruled unconstitutional in *Shurberg Broadcasting of Hartford, Inc. v. FCC*, 876 F.2d 902, rehearing denied, 876 F.2d 958 (D.C. Cir. 1989), petition for cert. pending.) The minority distress sale policy was an exception to the general rule that a licensee in hearing may not freely assign its station. *See Jefferson Radio Co. v. FCC*, 340 F.2d 781 (D.C. Cir. 1964). The ALJ, on January 20, authorized OCBC to negotiate a distress sale.

7. OCBC, however, was unable to reach agreement with a minority purchaser. On August 19, 1988, it submitted an alternative proposal involving a nonminority purchaser, the Oklahoma Educational Television Authority Foun-

dation, Inc. The National Black Media Coalition petitioned to deny the alternative proposal because it did not comply with the distress sale policy. OCBC thereupon withdrew the alternative proposal and, on November 1, proposed a sale to Maddox Broadcasting Corporation, a minority purchaser. Maddox, however, subsequently withdrew because of financial problems.

8. On February 1, 1989, OCBC submitted a further alternative proposal under which it would surrender its license and sell certain of its assets to Pappas Telecasting of Oklahoma. But Pappas terminated the agreement less than two weeks later.

9. In the meantime, on February 9, 1989, OCBC sought relief under Chapter 11 of the Bankruptcy Code. The Mass Media Bureau approved the involuntary assignment of KGMC(TV) to OCBC, debtor-in-possession on March 13, 1989 (thereby mooting the 1986 application to transfer control to Seema Boesky, who now votes the stock of OCBC, debtor-in-possession).

II. RELIEF REQUESTED

10. OCBC now seeks relief under the policy enunciated in *Second Thursday Corp.*, 22 FCC 2d 515, recon. granted, 25 FCC 2d 112 (1970). Like the minority distress sale policy, the *Second Thursday* policy represents an exception to the rule that a licensee may not freely transfer its station while there is an unresolved issue pending against it concerning its qualifications to be a licensee. Under the *Second Thursday* policy, a bankrupt licensee in hearing may transfer its station if:

> . . . the individuals charged with misconduct will have no part in the proposed operations and will either derive no benefit from favorable action on the [renewal and assignment] applications or only a minor benefit which is outweighed by equitable considerations in favor of innocent creditors. [citations omitted]

22 FCC 2d at 516 ¶ 5. The *Second Thursday* policy "accommodates the policies of the federal bankruptcy law with those of the Communications Act." *LaRose v. FCC*, 494 F.2d 1145, 1147 n.2 (D.C. Cir. 1974).

11. OCBC asks the Commission to approve a transfer of the 85 percent stock interest in OCBC now controlled by Seema Boesky (425 shares) to Ted Baze, currently the 15 percent owner of OCBC. The transfer would thus give Baze 100 percent ownership of OCBC. Baze would pay $425 (one dollar per share) for the stock, which is the stock's nominal par value.

12. OCBC explains that the transfer is part of a reorganization plan submitted to the bankruptcy court. The plan calls for the partial payment of claims by innocent creditors in connection with the continued operation of KGMC(TV) by Baze. Under the plan, OCBC would retire a $3.7 million claim by the NCNB Texas National Bank, N.A. at a discount by paying the bank $1.8 million. Alternatively, the bank would accept a 15 year $1.8 million note and a 20 percent nonvoting equity interest in OCBC. Different classes of program distributors would receive payment of all or part of their claims and would also share a 5 percent nonvoting equity interest in OCBC for a limited period. Various small unsecured creditors would be paid 70 percent of their claims. Baze would personally assume certain corporate liabilities.

13. The plan does not provide for any payments to the principals of BHHC (other than the $425 purchase price of the stock). Specifically, the Boeskys and other former owners would not be repaid: (1) $3,181,000 paid in 1983 in acquiring 85 percent ownership of OCBC, (2) approximately $7 million advanced toward the debt service on OCBC's bank loan and for operating expenses, and (3) a $1 million deposit used to secure the NCNB bank loan.

14. OCBC asserts that the plan will enable Baze, who has been responsible for KGMC(TV)'s day-to-day operation from the station's inception, to continue broadcast service in the public interest. OCBC also asserts that Baze is in no way implicated in the alleged misconduct. In particular, OCBC maintains that Baze had no knowledge of the BHHC voting trust during the period that it was undisclosed. Additionally, according to OCBC, Baze did not participate in the premature transfer of control occurring in December 1986, and insisted that the matter be reported to the Commission when he learned of it.

15. The Mass Media Bureau generally supports OCBC's petition. The Bureau agrees that the proposed transfer would terminate the participation of all alleged wrongdoers in OCBC. In this regard, the Bureau agrees that Baze bears no responsibility for the alleged misconduct. The Bureau also agrees that the transaction would provide no substantial direct or indirect benefits to alleged wrongdoers in light of the substantial losses that would not be repaid. (The Bureau, however, assumes that the alleged wrongdoers might ultimately be relieved of some future liability to third parties.) In the Bureau's view, the transfer would substantially aid innocent creditors and would facilitate television service in the public interest.

16. The Bureau, however, objects to one aspect of the proposed transfer. Section 12.11 of the parties' Stock Purchase Agreement provides that if within two years of the closing under the present transfer:

> . . . Baze shall sell, assign or otherwise transfer all or part of his equity interest in OCBC and/or OCBC shall sell, assign or otherwise transfer all or a part of its assets other than in the ordinary course of OCBC's business as conducted prior to the Closing, and Baze shall realize, directly or indirectly, a profit in connection with such transfer, Baze shall . . . pay to the Voting Trustee [that is, Seema Boesky] 85% of any profits realized by Baze . . .

The Bureau points out that this provision could result in payments to alleged wrongdoers and recommends that approval of the transfer should be conditioned on deletion of this provision.

17. In response to the Bureau's objection, OCBC notified the Commission that its principals agreed to delete the challenged provision. On August 7, 1989 and November 30, 1989, OCBC submitted amendments in which the parties agree to delete § 12.11. OCBC does not, however, concede that the provision is improper.

III. DISCUSSION

18. We find that the proposed transaction, as amended by the deletion of § 12.11, is consistent with the *Second Thursday* policy and would serve the public interest. *See* generally *Oyate, Inc.*, 3 FCC Rcd 6759 (1988). The proposed transfer would put control of KGMC(TV) in the hands of Baze, who has not been implicated in any wrongdoing. We find that Baze's sworn statement appended to OCBC's petition persuasively sets forth his lack of involvement in any misconduct. The Bureau, which examined Baze by deposition, is also satisfied as to his unblemished qualifications.

19. We also find that the proposed transfer would not result in any substantial benefit to alleged wrongdoers or any minor benefit that would not be outweighed by equitable considerations in favor of innocent creditors. Aside from the relatively insignificant sum of $425, the transaction does not contemplate that proceeds from the sale would be paid to alleged wrongdoers or on their behalf. Although effectuation of the reorganization plan (if approved by the bankruptcy court) might indirectly benefit wrongdoers by reducing their liability to third parties, this does not preclude approval of the transfer because: (1) the effect would not result from any payment of proceeds from the sale but would merely be incidental; (2) the reorganization plan precludes the repayment of more than $11 million in losses to BHHC's principals, including the alleged wrongdoers; and (3) the reorganization plan is designed to benefit innocent creditors as described above. *See Oyate, Inc.*, 3 FCC Rcd at 6762 ¶ 23.

20. Moreover, approval of the transfer would promote the operation of KGMC(TV) by an experienced broadcaster in the public interest. As in other bankruptcy sales, we will approve the proposal subject to further action by the Mass Media Bureau pursuant to its delegation of authority on the transfer of control application for station KGMC(TV).[1]

21. ACCORDINGLY, IT IS ORDERED, That the Petition to Terminate Hearing and for Special Relief filed June 20, 1989 by Oklahoma City Broadcasting Company, Debtor-in-Possession (as supplemented to take into account the deletion of § 12.11 of the Stock Purchase Agreement) IS GRANTED.

22. IT IS FURTHER ORDERED, That the application for transfer of control of station KGMC(TV) from Beverly Hills Hotel Corporation to Seema S. Boesky IS DISMISSED as moot.[2]

23. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED; provided that if the transfer of control of KGMC(TV) from Seema S. Boesky to Ted F. Baze is disapproved or is not consummated, the action taken herein shall be void.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] We also note that an application by OCBC for license renewal (File No. BRCT-880128KH) is also pending and awaiting action by the Bureau.

[2] As discussed in paragraph 9, above, the Bureau approved an involuntary assignment of KGMC(TV) to OCBC, debtor-in-possession. This action effectively gave control to Seema Boesky, who votes OCBC's stock.

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